(24,891)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 608.

CATHERINE C. REESE, ADMINISTRATRIX OF THE ESTATE OF GARRETT TRACY REESE, DECEASED, PLAINTIFF IN ERROR,

vs.

PHILADELPHIA AND READING RAILWAY COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 8, 1915.

DOCKET ENTRIES, UNITED STATES DISTRICT COURT, EASTERN PENNSYLVANIA.

June Session, 1913.

George Demming		Catherine C. Reese, Administratrix of the Estate of Garrett Tracy Reese, deceased.
2660		v.
Wm. Clarke Mason		Philadelphia & Reading Railway Company, a corporation.
1913, July	16	Praecipe for Summons filed.
		Summons exit returnable the first Monday of August next.
		Statement of Claim filed.
		Rule to Plead filed.
	31	Order for the appearance of Wm. Clarke Mason, Esquire, for defendant filed.
		Plea filed.
August	4	Summons returned "served" and filed.
	19	Order to place case on trial list filed.
September	23	Order to place case on trial list filed.
December	13	Order to place case on trial list filed.
1914, April	24	Jury called.
	29	The jurors render a verdict for the defendant, and in answer to the questions propounded to them by the Court say: Question 1. Was the injury to the plaintiff's husband from which he met his death caused by the defendant's negligence?

Answer. Yes. Question 2. If so did the deceased voluntarily assume the risk of injury? Answer. Yes. Question 3. Did the deceased contribute to his injury by his own negligence? Answer. Yes. Question 4. Is the plaintiff entitled to damages. Answer. Yes. Question 5. At what amount do you assess the damages suffered by the wife? Answer. $2286. Funeral expenses $214. At what amount do you assess the damages suffered by the respective children? Answer. $500. Total damages $5,000.00.

May 1 Plaintiff's Bill of Costs filed.
Defendant's Bill of Costs filed.
Plaintiff's motion and reasons for new trial filed.

2 Motion for judgment for plaintiff filed.

18 Argued sur motions for new trial and for judgment in favor of plaintiff.

22 Order denying defendant's motion for judgment and granting new trial filed.

1915, February 8 Jury called.

9 The Court enters a judgment of non-suit.

11 Motion to take off non-suit filed.

March 1 Argued sur motion to take off non-suit.

April 22 Order refusing plaintiff's motion to take off non-suit filed.

23 Order granting exception to refusal to take off non-suit filed.
24 Praecipe for judgment filed. Judgment accordingly.
Judgment filed.
27 Bill of Exceptions and Order sealing same filed.
Assignments of Errors filed.
Petition for Writ of Error filed.
Order allowing writ of error filed.
Bond sur writ of error and order of approval filed.
Writ of Error allowed and copy thereof lodged in Clerk's office for adverse party.
Citation allowed and issued.
Praecipe for transcript of record sur writ of error filed.
Citation returned "service accepted" and filed.

WRIT OF ERROR.

UNITED STATES OF AMERICA, *ss.:*

THE PRESIDENT OF THE UNITED STATES,

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania,

GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Catherine C. Reese, Administratrix of the Estate of Garrett Tracy Reese, Deceased, Plaintiff, and

Philadelphia & Reading Railway Company, Defendant, a manifest error hath happened, to the great damage of the said Catherine C. Reese, Administratrix of the Estate of Garrett Tracy Reese, deceased, as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Third Circuit, together with this writ, so that you have the same at the City of Philadelphia within thirty days, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable the Judges of the District Court of the United States, at Philadelphia, the twenty-seventh day of April
(Seal) in the year of our Lord one thousand nine hundred and fifteen.

GEORGE BRODBECK,
Deputy Clerk of the District Court of the United States.

Before THOMPSON, J.
Allowed
By the Court.

Attest:
GEORGE BRODBECK,
Deputy Clerk.

Catherine C. Reese, Administratrix of the Estate of Garrett Tracy Reese, Deceased, v. *Philadelphia and Reading Railway Company, a Corporation of the State of Pennsylvania.*	District Court of the United States Eastern District of Pennsylvania. June Sessions, 1913. No. 2660.

PLAINTIFF'S STATEMENT OF CLAIM.

(Filed July 16, 1913.)

The plaintiff, Catherine C. Reese, administratrix of the estate of Garrett Tracy Reese, deceased, claims of the defendant, the Philadelphia and Reading Railway Company, a corporation organized under the laws of the State of Pennsylvania, the sum of fifty thousand dollars ($50,000) as damages, which sum is justly due and payable to the plaintiff by the defendant upon the cause of action of which the following is a statement:

Plaintiff, Catherine C. Reese, as administratrix of the said estate of Garrett Tracy Reese, deceased, brings this action for the benefit of Catherine C. Reese, widow, and Gerald Reese, ten years of age, Joseph Reese, eight years of age, Elizabeth Reese, six years of age, John Reese, four years of age, and Andrew Reese, one year of age, all surviving, minor and dependent children, of said Garrett Tracy Reese, in accordance with the provisions of the Act of Congress, entitled "An Act relating to the liability of common carriers by railroads to their employees in certain cases", approved April 22, 1908, and the Amendment to said Act of Congress, approved April 5, 1910.

The defendant, the Philadelphia and Reading Railway Company, is a common carrier corporation, engaged in the business of transportation for hire, both of freight and of passengers, and is engaged in interstate and foreign commerce, and is incorporated for

this purpose under the laws of the State of Pennsylvania.

Said Garrett Tracy Reese, deceased, was employed and hired by said defendant corporation, under the name of Gerald T. Riley, in the capacity of fireman on a locomotive belonging to and controlled by said corporation, and performed the labors of fireman for said corporation in its interstate and foreign commerce.

On or about the eighteenth day of November, 1912, a few minutes before midnight of said November 18, 1912, or on or about midnight on the night of November 18 and November 19, 1912, on and about the two main tracks of said defendant corporation located on Front Street, Philadelphia, Pennsylvania, and at, or near the beginning and the branching of the tracks into what is known as the Willow and Noble Streets yard of said defendant corporation, about midway between Noble and Nectarine Streets on said Front Street, Philadelphia, Pennsylvania, while the said Garrett Tracy Reese, the husband of said widow, Catherine C. Reese, and the father of said children enumerated above, was employed by said defendant corporation in said capacity of fireman on and about one of its locomotives, which locomotive was engaged at the time in interstate and foreign commerce and traffic, and which locomotive, and said Garrett Tracy Reese, its fireman, was being used on and about the cars, tracks, road-bed and right of way used and employed by said defendant corporation in its interstate and foreign commerce, without any negligence or carelessness whatsoever on the part of said Garrett Tracy Reese, and while said Garrett Tracy Reese was in the proper performance of his duties, and using the facilities, devices and apparatus furnished to him by his employer, the said defendant corporation, as he was required to do, and had the right to do, by reason of his duties and the circumstances surrounding the same, and while the

said Garrett Tracy Reese, the deceased, was using, in a careful and proper way, the spigot or water faucet at the side of the tender attached to his locomotive, his head or body or both his head and body, came in contact with a car, or the side of a car, standing or located upon the track adjoining that upon which said deceased's locomotive and tender was running, whereby and by reason of said blow, shock or coming in contact, said Garrett Tracy Reese, deceased, lost his position and fell, or was dragged and pulled from his position, and was rolled, squeezed and crushed between said car and the tender of said locomotive, causing said Garrett Tracy Reese serious and painful internal injuries. Said Garrett Tracy Reese, deceased, while properly and carefully using said faucet or spigot, as aforesaid, came in contact with and was struck and injured by said car on the adjoining track, by reason of the negligent and improper construction and maintenance of said tracks, road-bed and right of way of said defendant corporation and said Garrett Tracy Reese was struck by and came in contact with said car on said adjoining track because of the fact that said defendant corporation negligently and improperly constructed and maintained said track upon which said deceased's engine and tender was running, and the adjoining track upon which said car was standing or located, in too close proximity to each other.

And by reason of said internal injuries received by said Garrett Tracy Reese being squeezed, rolled and crushed between said car and tender, shortly thereafter, on the following day, November 19, 1912, he died.

At the time the said Garrett Tracy Reese, deceased, received said injuries above stated, and while he was employed by said defendant corporation in the capacity of locomotive fireman, as aforesaid, said Garrett Tracy Reese was engaged in interstate and foreign

commerce as the employee of said defendant corporation; and at the same time, when said injuries were received by said Garrett Tracy Reese, deceased, the defendant corporation was also engaged in interstate and foreign commerce.

At the time of the receiving of said injuries by the said Garrett Tracy Reese, deceased, while in the employ of said defendant corporation, said Garrett Tracy Reese, deceased, lived with said Catherine C. Reese and her five children as above set forth, being the offspring of the said Garrett Tracy Reese, deceased, he was the sole support and maintenance of said Catherine C. Reese and their five children, all of whom were dependent upon said deceased. By reason of the death, therefore, of said Garrett Tracy Reese, through the injuries received as aforesaid, said widow and said five children are deprived of the fellowship and companionship of her husband and their father, are robbed and deprived of his support and maintenance for all time to come, said widow is and has been put to great loss for funeral expenses and otherwise, and together with her children is thrown absolutely on her own resources and efforts to gain a livelihood for herself and for them, and altogether damaged in the sum of fifty thousand dollars ($50,000), as above set forth.

Wherefore plaintiff brings this suit.

GEORGE DEMMING,
Attorney Pro Plaintiff.

RULE.

Sir:

Enter rule on defendant to plead within fifteen days, or judgment sec. leg.

GEORGE DEMMING,
Attorney Pro Plaintiff.

July 16, 1913.

To the Clerk,
District Court of the United States,
Eastern District of Pennsylvania.

PLEA.
(Filed July 31, 1913.)

To Clerk of above Court:

The defendant railway company pleads "Not Guilty".

WM. CLARKE MASON,
Attorney for Defendant.

BILL OF EXCEPTIONS.
(Filed April 27, 1915.)

Be it remembered, that in the said term of June came the said plaintiff into the said court, and impleaded the said defendant in a certain plea of trespass, etc., in which the said plaintiff declared (prout narr.) and the said defendant pleaded (prout pleas). And thereupon issue was joined between them.

And afterwards, to wit, at a session of said court, held at the county aforesaid, before the Honorable J. Whitaker Thompson, Judge of the said court, the eighth and ninth days of February, 1915, the aforesaid issue between the said parties came to be tried by a jury of the said county for that purpose duly impanelled (prout list of jurors), at which day came as well the said plaintiff as the said defendant by their respective attorneys; and the jurors of the jury aforesaid impanelled to try the said issue, being also called, came, and were then and there in due manner chosen and sworn or affirmed, to try the said issue; and upon the trial the counsel of the said plaintiff offered evidence on her behalf as par-

ticularly set forth in the following transcribed stenographic notes of testimony produced at the trial:

Before Hon. J. Whitaker Thompson, J., and a jury.

Philadelphia, Monday, February 8, 1915.

Present: George Demming, Esq., representing the plaintiff.

William Clarke Mason, Esq., representing the defendant.

Jury impanelled, sworn or affirmed February 8, 1915.

Transcript of testimony, rulings of the Court, charge of the Court, and exceptions.

PLAINTIFF'S EVIDENCE.

Catherine C. Reese, having been duly sworn, was examined and testified as follows:

By Mr. Demming:

Q. Where do you live?

A. 824 Almond Street, Philadelphia.

Q. Where did you live at the time of this accident?

A. 1126 East Montgomery Avenue.

Q. Also in Philadelphia?

A. Yes, sir.

Q. Was Garrett Tracy Reese your husband?

A. Yes, sir.

Q. At the time of the accident under what name was he working for the Reading Railroad?

A. Gerald T. Riley.

Q. Can you explain to the court and jury why he was working under that name?

A. Well, he had left the railroad for some reason, and when he came back again he went under the name of Gerald T. Riley.

Q. That is, he left the railroad company's employ several years previous to the accident?

A. Yes, sir.

Q. How long had he been working for the company under the name of Riley?

A. Three years.

Q. In what position was he working for the company?

A. Fireman.

Q. Locomotive fireman?

A. Yes, sir.

Q. Did you take out letters of administration on his estate?

A. Yes, sir.

Q. Are these the letters of administration?

(Letters of administration handed witness.)

A. Yes, sir.

MR. DEMMING: I offer in evidence letters of administration taken out March 8th, 1913, deputing, constituting and appointing Catharine C. Reese administratrix of the estate of Garrett Tracy Reese.

(Letters of administration marked "Plaintiff's Exhibit A, 2-8-1915, C. F. P.")

By MR. DEMMING:

Q. By your husband, Mr. Reese, or who was known as Mr. Riley to the Reading Railway at the time of this accident, how many children had you?

A. Five children.

Q. Will you give us their names and ages?

A. Gerald was ten years old at that time; Joseph was eight; Elizabeth six; John three, and Andrew seven months.

Q. You have four boys and one girl?

A. Yes, sir.

Q. All by Mr. Reese?

A. Yes, sir.

Q. Will you tell us on an average how much money Mr. Reese gave you, we will say by the month, for the support of yourself and the children?

A. Well, on an average of $65 a month.

Q. For how long a time previous to the accident would that be the average?

A. Well, taking it all, I guess for a year.

Q. The accident happened on what day?

A. On the 18th of November, 1912.

Q. Night time or day time?

A. Night time.

Q. When was the first you knew of it?

A. At a quarter of one, November 19th, 1912.

Q. By reason of the accident to your husband were you put to any expenses?

A. His funeral expenses.

MR. MASON: That is objected to. If your Honor please, I object to any testimony concerning the amount of the funeral expenses of this plaintiff. The suit is brought for the benefit of the widow and children. It is not brought for the benefit of the estate. Now, a man has got to die some day. His estate has got to pay his funeral expenses some day, and that is not an element of damage in these cases.

MR. DEMMING: If your Honor please, if there had been no letters of administration taken out, certainly this woman would have had to pay the funeral expenses. So that I do not see that it is an expense of the estate and not of the widow. She was put to the expense necessarily by reason of the man's death, and I think, therefore, it is a proper item of expense and a proper item to enter into the verdict. As your Honor well knows, several of these cases have gone to the United States Supreme Court, in which in the verdict was in-

cluded the amount of the funeral expenses. The point was never specifically raised, but the Court has approved of those verdicts and I take it, therefore, has approved of that as a proper item in the verdict. There is nothing, unfortunately, said in the act itself about that.

By THE COURT:

Q. Who paid the funeral expenses?

A. I did.

THE COURT: The objection is overruled, and an exception granted to the defendant.

(Exception noted for defendant by direction of the Court.)

By MR. DEMMING:

Q. How much were those expenses?

A. $214.

Q. They were for what?

A. Just his funeral expenses.

Q. Just the burial expenses?

A. Just the burial.

Q. What was your husband's age?

A. His age was thirty-seven. He would have been thirty-eight his next birthday.

Q. What was his physical condition at the time of his death?

A. Well, he had the best of health. He was a strong hearty man.

Q. Had he ever lost a day from work that you know of by reason of illness?

A. No. Not to my knowledge.

Q. How about his habits?

A. Well, he had very good habits. He occasionally took a drink, but not to excess.

Q. A drink of beer?

A. Yes, sir.

Q. Did he ever lose any work by reason of drinking?

A. Not to my knowledge.

Q. Have you any photograph of him?

A. I have one with the engine. I think you have it.

Q. Is this it? (Small photograph showing group of men standing alongside of a locomotive shown witness.)

A. Yes, sir; that is it.

Q. Which one is he?

A. This one (indicating).

Q. The second man from the left-hand side of the photograph?

A. Yes, sir.

MR. DEMMING: I offer the photograph in evidence.

(Photograph marked "Plaintiff's Exhibit B, 2-8-1915, C. F. P.")

By MR. DEMMING:

Q. How long before the accident was that photograph taken?

A. I don't just know. Not more than a year.

CROSS-EXAMINATION.

By MR. MASON:

Q. I understand that you say you paid these funeral expenses yourself?

A. Yes, sir.

Q. You paid them out of your husband's savings, did you not?

A. Out of an insurance that I kept up for him; yes, sir.

Q. So that that insurance was paid to his estate when he died?

A. Yes, sir.

Q. You say that your husband was known to the railroad as Riley?

A. Yes, sir.

Q. And he told you that he had been obliged to give that name in order to get employment because he had left the company after he had been employed as Reese?

A. I never knew any other reason.

Q. You did not know what was the reason he was discharged, did you?

A. Not without it was indifference. I never knew.

Q. Do you know whether or not it was because he drank?

A. I never knew.

Q. You never knew the reason at all?

A. No, sir.

Q. But he told you that in order to get back he had to give another name so that the records would not show that he was being employed again?

A. Yes, sir.

RE-DIRECT EXAMINATION.

By MR. DEMMING:

Q. But you say that according to your knowledge of the man he never drank to excess?

A. Not to excess.

Q. Or to interfere with his work in any way?

A. No, sir. Not to my knowledge.

MR. MASON: If Mr. Demming is not going to go into it—I tried to have him do it, and he has not done it yet, as to how much of this $65 went to his widow and children. I do not want to raise that question hereafter, but it ought to be clear on the record, because your Honor and I will have nothing to go on.

MR. DEMMING: I think my question was that, if your Honor please. I asked her how much money he paid her each month for the support of herself and her children.

By Mr. Mason:

Q. Did you mean when you answered Mr. Demming's question that that $65 was used exclusively for yourself and the children, or was it used to keep up the house generally and your husband lived there with you and participated in the household expenses?

A. Yes, sir. For rent and his food.

Q. So that he shared in the $65?

A. Yes, sir.

Q. As a matter of fact, he gave you what his monthly check was and you used it for him and yourself and the children?

A. Yes, sir.

Q. And he did not keep anything out of what he earned for himself, did he?

A. Well, he always paid his tobacco bill and clothed himself and kept up societies out of his own money. He had that to do.

Q. Out of this $65?

A. No. Out of what he had himself.

Q. Did you give it back to him?

A. No. I never gave it to him. He gave me that.

Q. He gave you that?

A. Yes, sir.

Q. And all you did was to give him a home and to feed him?

A. That is all.

By Mr. Demming:

Q. Are you able to tell what proportion of that $65 that you got each month from your husband went for the support of yourself and for each of your five little children?

A. That would be impossible for me to tell that.

Q. You could not tell?

A. No, sir; I could not tell.

Q. You could not divide it?

A. No.

JAMES NEILL, having been duly sworn, was examined and testified as follows:

By MR. DEMMING:

Q. Where do you live?

A. 2241 North Fourth Street, Philadelphia.

Q. Your business is what?

A. Conductor.

Q. For the Philadelphia and Reading?

A. Philadelphia and Reading; yes, sir.

Q. Were you the conductor of the crew on the night that Mr. Riley or Reese was killed?

A. Yes, sir.

Q. Did you see the accident?

A. No.

Q. How long had you known Reese or Riley?

A. Ever since he worked on the railroad. Since he first came on the railroad. That is all.

Q. How long was that?

A. About two or three years.

Q. Will you tell the Court and jury what kind of a workman he was, whether he was efficient or not?

A. Well, he filled the job all right. I had no trouble with any of them, as long as they did the work.

Q. You had no trouble at all?

A. No trouble at all.

Q. Was he a man of good or bad health?

A. Good health.

Q. Good or bad habits?

A. Good habits.

Q. Will you tell the Court and jury in your own way just what the engine had been doing previous to the accident, and what the engine was doing at the time of the accident?

A. We went in House No. 4 and got hold of two cars and put one on the street on the straight rail to clear the depot. The other car we took—we crossed

over and put it on 9, and pulling off of 9 is when the accident happened.

Q. Just so we can get that a little clearer, because of course it is very familiar to you, more so than it is to us because we were not there. You came out of House 4, you say?

A. Yes, sir.

Q. By House 4 you mean a warehouse?

A. No. A freight shed.

Q. That is on which side of Front Street?

A. On the west side of Front Street.

Q. Are there a number of freight sheds there?

A. Yes.

Q. With tracks leading into them?

A. Yes, sir.

Q. From Front Street?

A. Yes, sir.

Q. What is that whole place known as in the parlance of you railroad men?

A. Willow and Noble Street freight yard.

Q. Is it extensive, a large freight yard, with a great many tracks in it?

A. Well, there are not many tracks in it. There are only three or four in all of them.

Q. How many freight sheds were there altogether?

A. Four right there.

Q. All on the west side of Front Street?

A. There are three on the west side of Front Street.

Q. Where is the fourth one?

A. On the east side.

Q. This freight house No. 6 is on the east side?

A. Yes, sir. No. 6.

Q. Then the tracks branch out and go down on the wharves and piers, too, don't they?

A. Yes, sir. Not from that side, though. Not from the west side.

Q. From the east track?

A. They branch from the east track.

Q. The track that goes to the freight house No. 6 branches from the west track, does it not?

A. It branches from the west.

Q. And then the tracks that go to the wharves and piers branch from the east track?

A. The east track.

Q. Further east there are two main tracks leading to the yard on Front Street?

A. Yes, sir.

Q. And then when these two main tracks get to the point where the accident happened to Reese they begin to branch, don't they?

A. Yes, sir. They branch.

Q. And split up into a number of small tracks?

A. Yes, sir.

Q. From these tracks that lead down to the piers and wharves vessels are loaded, are they not?

A. Yes, sir.

Q. Loaded and unloaded?

A. Yes, sir.

Q. The contents of cars of the Reading Railroad are put on vessels, and in some cases the contents of the vessels are put on the cars? That is true, is it not?

A. Yes, sir.

Q. And these tracks are used for that purpose?

A. Yes, sir.

Q. How long a distance do these two main tracks lead up Front Street before they come to another yard?

A. They run double track up to Second and Germantown Avenue, and then from Second and Germantown Avenue to Master Street it runs single track.

Q. We will go back again to what you say the engine was doing. You left the one box car, you say, on the straight track?

A. Yes, sir.

Q. After coming out of House 4?

A. Yes, sir.

Q. In other words, when you came out of House 4 the engine was pulling two box cars?

A. Yes, sir.

Q. What was the number of your engine, by the way?

A. I don't remember.

Q. 1152, wasn't it?

A. The engine number was 1152, yes.

Q. The engine left one box car on the straight track, which was the western track on Front Street?

A. Yes, sir.

Q. Was that by your orders?

A. Yes, sir; it was by my orders.

Q. Your orders were given to whom?

A. To the crew.

Q. Whom did you tell to leave the box car there?

A. I left it there myself.

Q. Did you uncouple it?

A. I uncoupled it.

Q. You did that yourself?

A. Yes, sir.

Q. What was the purpose of leaving that car there?

A. It was to go up town. The purpose of leaving it there was to make up a train to go up town.

Q. Where was the car destined for?

A. I don't remember now.

Q. You do not recall that?

A. No.

Q. Did the engine stop for the purpose of leaving that car there?

A. Yes, sir.

Q. Then, after leaving the car there the engine proceeded with the other box car down the western track on Front Street to a cross-over, did it?

A. No. It went up the western track to a cross-over.

Q. It went north on the western track?

A. Yes, sir.

Q. To the first cross-over?

A. Yes, sir.

Q. And then came over on the eastern track?

A. Yes, sir.

Q. Up to that point the engine had been pulling the box car, and then it proceeded to push the box car, did it not?

A. Yes, sir.

Q. And pushed it down on the western track and around the curve of what you call No. 9 track?

A. Yes, sir.

Q. How far around the curve did it go?

A. About four car lengths from where the other car was.

Q. And then left that box car there?

A. Yes, sir.

Q. That is, the second box car?

A. Yes, sir.

Q. Do you know where that car was destined for?

A. I think it was loaded for Broad Street.

Q. Broad Street, do you say?

A. Broad Street Station.

Q. Do you mean on the Pennsylvania Railroad?

A. No. On the P. R. R.

Q. Tell us the station. Where is that? Where is the Broad Street Station?

A. Broad and Willow.

Q. Was that the final destination of the car, or where was it?

A. I don't know. I couldn't tell you that.

Q. Then, the engine after leaving the box car there on track 9 came around light? That is, it had no load at all, after leaving that car there, had it?

A. No.

Q. The next duty of the engine was what?

A. It was to get the rest in the depot and couple up to this car.

Q. It was to couple up the rest of the cars?

A. Get them out of the depot and couple them up on the street.

Q. Then, the engine had started for that purpose?

A. Yes, sir.

Q. How many were the rest of these cars?

A. About five or six cars.

Q. They were destined for where?

A. Between Berks Street and Bound Brook, the Newtown Branch.

Q. Bound Brook, New Jersey?

A. Yes, sir.

Q. One was to go to Bound Brook?

A. Oh, I don't know. Between those stations.

Q. How many were there? Five or six cars?

A. Five or six cars.

Q. How many went outside of the state? At least two, didn't they?

MR. MASON: I object to that.

By MR. DEMMING:

Q. You tell us. How many?

A. I don't have anything to do with that. After I take the cars to Berks Street, that is all I have to do with the cars.

Q. As a matter of fact, you knew, didn't you, or you know now?

A. I had the tickets, yes.

Q. And that showed you the destination?

A. Yes, sir.

Q. Where were each of these cars bound for?

A. I couldn't tell you where each one was individually bound for. For local points all the way along the line.

Q. Give us your best knowledge of where the cars went.

MR. MASON: I object to him giving his best knowledge.

THE COURT: I do not see how he can testify unless he testifies to his best knowledge.

MR. MASON: That is why I object to the question. This witness is not competent to testify from recollection if there is a better and a proper way to prove it.

MR. DEMMING: If this witness knows he can say.

MR. MASON: This witness has said that there was a ticket for each car. Now, to have this witness testify to his knowledge of what the ticket shows is not the best way of proving that fact.

By MR. DEMMING:

Q. Do you remember where these cars were bound for?

A. No.

Q. Are you sure of that?

A. I know they were the Bound Brook local, the "Dutch Local". That is all the satisfaction I can give you.

Q. I hand you a blue print, which is entitled, "Sketch of tracks at north approach of the Willow Street yard", and ask you whether that correctly shows the tracks at that place, at the point of the accident? You notice there the two main tracks on Front Street, don't you?

A. Yes, sir.

Q. You notice the track No. 9, the curved track around where you placed the box car? That is there, is it not?

A. Yes, sir.

Q. And the track on which you left this box car standing? The straight track is there, is it not?

A. Yes, sir.

Q. That shows the point of the accident, does it not, and the tracks, and their relative positions? That is true, is it not?

A. Yes, sir; that is right.

THE COURT: Did this accident occur on Front Street or Willow Street?

MR. DEMMING: It occurred between Noble and Nectarine Street on Front Street.

By MR. DEMMING:

Q. That is true, is it not?

A. Yes, sir.

Q. At a point about half way between Noble and Nectarine, was it not?

A. Yes, sir.

Q. On Front Street?

A. Yes, sir.

Q. The idea of leaving that box car, the first box car that you left, on the straight track on Front Street was what? What was your idea in leaving it there?

A. So as we could couple up to it.

Q. But your idea in leaving it at that particular point was what, with reference to clearance?

A. To couple up, so we could couple it up and take them to Berks Street.

Q. It was left at that special point so the engine going around the curve would clear it, was it not?

MR. MASON: I object to that question.

THE COURT: The objection is sustained.

By MR. DEMMING:

Q. Was it left at that place with any idea of clearance?

MR. MASON: I object to the form of the question.

THE COURT: It seems to me you are leading the witness.

MR. DEMMING: There are several reasons why it was left there. He has given some reasons. I want to know the other reasons.

THE COURT: He has not stated that he has any other reasons. You can ask him whether there were any other reasons, and if so what they were.

By MR. DEMMING:

Q. Were there any other reasons?

A. No, sir.

Q. Why was not the car pushed further back on that main track?

A. Why, it would not have held all the cars if we had pushed it back. We had to put it on the street, and we had to have room for the rest on the straight line.

Q. There was plenty of room on the main track, was there not?

A. Yes, sir.

Q. It could have been pushed further back?

A. Yes.

Q. Further south? That is true, is it not?

A. Yes, sir.

CROSS-EXAMINATION.

By MR. MASON:

Q. Will you look at this plan which I show you, marked "Reese vs. Railway". The northbound or westernmost track is colored in a sort of a buff and marked "northbound track", is it not?

A. Yes, sir.

Q. Which house was that that you pulled the two cars out of, one of which you left standing on the northbound track? That was house number what?

A. House No. 4.

Q. And the switch that runs into House No. 4 runs off of the northbound track, does it not?

A. Yes, sir.

Q. And the southbound track, which goes into

House No. 6 and connects with what you call Track No. 6 is colored green on this plan, is it not?

A. The southbound leads into House No. 6.

Q. Doesn't that connect with the tracks that lead into House No. 6?

A. Yes, sir.

Q. The track marked in green on that plan, with the various connections of it, the entire thing marked green, comes out from Track No. 9 until it makes a connection with the straight track that is the easternmost track on Front Street?

A. Yes, sir.

Q. Will you indicate with reference to the frog of the switch that leads off of the southbound track, or the northbound track, which ever you please, as the point where you picked up Reese's body or found him lying? About where?

A. About right there (indicating).

Q. Was it between the two straight tracks that you found him?

A. Right between the two straight tracks.

Q. And it was about opposite to the centre of Freight House No. 5?

MR. DEMMING: I object to that.

MR. MASON: This is cross-examination.

MR. DEMMING: I understand that, but you cannot put words in his mouth.

THE COURT: I never understood that you could object to leading questions on cross-examination.

MR. DEMMING: When they get too far leading.

By MR. MASON:

Q. You say that you found Reese's body between the two straight tracks. Now, was it opposite to the middle of the Freight House No. 5?

A. No.

Q. About where was it?

A. Right about where the switch is that leads to the new cold storage ladder.

Q. At the frog of the switch or to the south of the frog?

A. A little north of the frog.

Q. Are you referring to a switch that leads off of the northbound track or the southbound track?

A. The northbound track.

By Mr. Demming:

Q. That is the western track?

A. The western track.

By Mr. Mason:

Q. So that the point where his body was would be about where that figure 5 appears on this plan?

A. Yes, sir. Somewhere about there.

Q. With reference to the box car that was standing on the northbound track, where was the south end of that box car? Was it south of Reese's body or north of his body?

A. South of Reese's body.

Q. With reference to the car, where was his body lying? About in the centre or at either end of the car?

A. Right at the north end of the car.

Q. His body was lying at the north end of the car?

A. About; yes, sir.

Q. How far from the north end was his body? Was it south of the north end or north of the north end?

A. North of the north end.

Q. So that his body when you found it was lying north of the north end of the box car standing on the track?

A. Yes, sir.

Q. And the whole of the car was to the south of him?

A. Yes, sir.

Q. That put the north end of the car below the beginning of the curve of the southbound track, wouldn't it?

A. Just about where the curve starts.

By Mr. Demming:

Q. That is, at the figure 5?

A. Yes, sir.

By Mr. Mason:

Q. I understood you to say that the north end of the car was below what would be the figure 5 here?

A. The car stood right here just to clear the switch (indicating).

Q. Just to clear what switch?

A. The switch that leads into the house.

Q. Which house?

A. House No. 3.

Q. It was south of that frog?

A. No. North. It just stood between here and here (indicating).

Q. So that the south end just cleared the frog of the switch that leads into the House No. 3?

A. No. The switch was set for House No. 3. The car headed in toward House No. 3, but the car was not in there. The switch was set that way.

Q. The switch that you speak of that leads into House No. 3 is the first switch that appears on the left-hand side of picture A, is it not? (Photograph marked "A" shown witness.)

A. Yes, sir.

Q. And the track on which the engine in picture A appears is the track that leads out from No. 9 on which this engine was moving at the time of the accident?

A. Yes, sir.

(Photograph A exhibited to the jury.)

By Mr. Mason:

Q. This engine was a shifting engine, as I understand it?

A. Yes, sir.

Q. And your duties were to handle cars inside of the yard limits?

A. Yes, sir.

Q. Moving them around from place to place wherever the yardmaster told you they were to go?

A. Yes, sir.

Q. And then you would carry a drag of cars from the Noble Street yard up to Berks Street and a drag of cars from Berks Street down, would you not?

A. Yes, sir.

Q. Did your crew ever work outside of the Philadelphia yard?

A. No, sir.

Q. How long had Riley, or Reese, as we know him now, worked with you?

A. Well, he worked a couple of months on that job.

Q. Did you work at night time or in the day time?

A. Night time.

Q. Was the place well lighted all around there?

A. Yes, sir.

Q. On other occasions had you used what they call the northbound track to stand cars on in making up your train?

A. Yes, sir.

Q. Had you placed any cars at the same place where this car was standing on other occasions?

A. Yes, sir.

Q. Had the cars been placed there by this same engine on which he was fireman?

A. Yes, sir.

Q Was he on the engine at that time?

A. Well, I couldn't see on that side whether he was on the engine, but it was his place to be on there if he wasn't.

Q. On other occasions prior to this during the two months he was there also?

A. Yes, sir.

Q. How did the engine move in onto No. 9 track—tender first or head first?

A. Tender first.

Q. That brought the fireman's side next to this car as it moved in on No. 9 track, did it not?

A. Yes, sir.

Q. After you came out of No. 4 freight house and placed this box car that was standing on the northbound track where the accident happened, what other movements did you make with reference to any other cars beside the car that was coupled up to the engine? Anything?

A. No, sir.

Q. Did you move any cars out of the cold storage house?

A. I don't remember if there were any cars moved out or not.

Q. Tell me just how you worked. Did you do general yard service along with the making up of your train?

A. Yes, sir. We did all the shifting there. That was our main point, to work around there and do the shifting.

Q. So that as you would make up a train you would pick up a car whenever you came to it and set it out?

A. Yes, sir.

Q. Then you would proceed to do some shifting around in the yard until you picked up another car?

A. Yes, sir.

Q. And then you would put it in the train?

A. Yes, sir.

Q. And after you got your train complete, or the drag, as you call it, complete, then you would take it up to Berks Street?

A. Yes, sir.

Q. The car that you had left on the No. 9 track

prior to the accident was one of the cars that you had been moving in the general yard service?

A. Yes, sir.

Q. What you call shifting service?

A. Yes, sir.

Q. How long after the accident was it before you moved your drag?

A. Oh, I guess there was half an hour's delay around there.

Q. During the period that elapsed between the accident and the time you moved the drag, did you do any shifting around in the yard in addition to making up the drag?

A. No, sir.

Q. Was your drag complete at that time?

A. Well, all we had to do was to go up to the Noble Depot and get them out and double up on the street.

Q. You had how many brakemen with you at that time?

A. Two brakemen.

Q. Two brakemen, yourself and the engineer and the fireman?

A. Yes, sir.

Q. Do you know whether Reese had ever been employed in the Noble Street yard prior to the two months that you speak of?

A. Well, he worked extra. He worked on all jobs. Previous to that he was accustomed to working on every engine. Wherever there was a fireman short he was just put there.

Q. The position in which you placed this car on the northbound track was such that the engine and tender and car attached to the engine cleared it perfectly?

A. Yes, sir.

Q. There was no touching of the engine or the tender of the car?

A. No touching.

Q. So that the position in which you placed it was a free clearance?

A. Yes, sir.

Q. For any cars or engines moving on the south-bound track?

A. Yes, sir.

RE-DIRECT EXAMINATION.

By MR. DEMMING:

Q. You have said in cross-examination that Mr. Reese was an extra fireman previous to those two months?

A. Yes, sir.

Q. But you do not know of your own knowledge that he ever worked in the Noble Street yard outside of those two months, do you?

A. Yes, sir.

Q. I say you don't know?

A. Yes, I do.

Q. When did he work in the Noble Street yard?

MR. MASON: If your Honor please, this is Mr. Demming's witness, and the answer shows how much easier it would be if he would put his question properly.

THE COURT: It is leading.

By MR. DEMMING:

Q. I ask you, did you ever know any time outside of the two months when he worked in the Noble Street yard?

A. Yes, sir. He worked on nearly all the jobs down there previous to this.

Q. For how long previous to the accident did he work down there as a fireman?

A. Two months he worked with us. About two months.

Q. Of your own knowledge do you know any other

time he worked there? Of your own knowledge, not what anybody has told you, or anything of that sort.

A. Nobody else told me. But he worked on all the jobs previous to that. He was an extra fireman previous to that, and he worked on all jobs wherever there was a man vacant.

Q. Yes, on the Reading system, in all parts of Philadelphia?

A. Noble Street, too.

Q. Do you know of your own knowledge that he worked in Noble Street?

A. Yes, sir.

Q. When?

A. Well, I haven't got the date down.

Q. You have said in answer to Mr. Mason on cross-examination that when the engine and tender first pushed the car around the curve on track 9—we will call it the second box car—for the purpose of leaving it there, it would bring the fireman's side of the engine nearest to the car which you had left standing on the straight track?

A. Yes, sir.

Q. Of course, you do not know where Reese was at that time, or what he was doing, do you?

MR. MASON: I must object to that.

THE COURT: That is very decidedly leading.

By MR. DEMMING:

Q. Do you know what Mr. Reese was doing at that time?

A. No, sir.

Q. The next duty after leaving that car on No. 9 you say was what, the next duty that you actually did?

A. To get cars out of the depot and double up on the street.

Q. For the purpose of what?

A. Taking them north to Berks Street.

Q. Was or was not that the duty that the engine was coming out on track 9 to do at the time of the accident?

A. Yes, sir.

Q. Those are the cars that you say you do not remember their destination?

A. No, sir.

Q. When you say that half an hour elapsed after the accident, do you mean the half an hour's delay was caused by the accident?

A. Yes, sir.

Q. You have said in cross-examination that the engine and tender cleared the car which you had left standing on the straight track?

A. Yes, sir.

Q. That no part of the engine hit the car?

A. No part of the engine hit the car.

Q. Do you, as a matter of fact, know how much that clearance was?

A. No.

Q. You do not know?

A. No.

Q. By the term drag you mean these cars, do you not, that were waiting to be taken up to Berks Street?

A. Yes, sir.

Q. The train?

A. Yes, sir.

Q. It is another name for a train?

A. Yes, sir.

Q. Did Mr. Reese, the dead man, have anything to do about coupling and uncoupling the cars? Was that any part of his duties?

A. No, sir.

Q. His duties were what?

A. To fire the engine and look out for signals.

Q. Look out for signals for what purpose?

A. On his side, in case we could not see the en-

gineer. It was his duty to look out for signals of all kinds.

Q. Which signals he would give to the engineer?

A. Yes, sir; pass over to the engineer.

Q. Trains at that point or engines at that point were worked under verbal orders, did they?

A. Yes, sir.

Q. Orders were transmitted to you and then you transmitted them to the rest of the crew?

A. Yes, sir.

Q. I will ask you before you finish whether you identify these photographs of the plaintiff's as also correctly showing the scene of the accident. This photograph No. 1 shows Front Street a short distance north of the scene of the accident, looking south, does it not?

A. Yes, sir.

Q. And shows the freight houses on the west side of Front Street and also the freight house No. 3 below, does it not?

A. Yes, sir.

Q. It shows also the beginning of the curved track No. 9, does it not?

A. Yes, sir.

Q. I hand you photograph No. 2. That shows the point of the accident taken at a position shortly south of the place of the accident, does it not?

A. Yes, sir.

Q. Showing the view looking up or north on Front Street?

A. Yes, sir.

Q. I hand you photograph No. 3. Does that show track 9 as it leads down to the wharf?

A. Yes, sir.

Q. And also in the foreground of the picture the two main tracks on Front Street, does it not?

A. The two main tracks? That is a side track

there (indicating). This is leading into house No. 6. This is track 9, right here (indicating).

Q. Is the box car shown in that picture standing on track No. 9 alongside of the wall of the storage house?

A. No.

Q. Which is No. 9 track, then?

A. No. 9 would be right here (indicating). This track leads into house 6. No. 9 track has no cars on it. No. 9 is right along on the other side.

Q. I hand you photograph No. 4 and ask you if that shows a bird's-eye view of the point of the accident?

A. Yes, sir.

Q. It shows the two straight tracks on Front Street?

A. Yes, sir.

Q. The No. 9 track?

A. Yes, sir; it shows No. 9 lead.

Q. It shows where track 9 begins?

A. Yes, sir.

Q. It shows you on the left-hand side of the photograph the freight warehouse or the freight sheds on the west side of Front Street, does it not?

A. Yes, sir.

RE-CROSS-EXAMINATION.

By MR. MASON:

Q. The engine at the time of the accident was being operated by the engineer, was it not?

A. Yes, sir.

Q. And he was on the side furtherest away from the box car?

A. Yes, sir.

Q. You are familiar with the duties of both the engineer and fireman, are you not?

A. Yes, sir.

Q. In coming out of No. 9 track there was no duty

that Reese was called upon to perform that would require him to extend his body outside of the line of the tender as he passed that box car?

A. None whatever.

By Mr. Demming:

Q. That is to say, do you consider getting a drink a duty?

A. There is more than one place to get a drink.

Q. Do you consider getting a drink of water out of the faucet on the tender a duty?

A. No.

Q. But the fireman and engineer did that nevertheless, did they not?

A. If they did, they did it at their own risk.

Q. They did it continually, did they not?

A. I don't know whether they did it or not.

Joseph D. Egan, having been duly sworn, was examined and testified as follows:

By Mr. Demming:

Q. Where do you live?

A. 2818 Chatham Street, Philadelphia.

Q. What is your business?

A. I am driving a team now.

Q. On November 18th and 19th, 1912, what was your business?

A. Railroad brakeman for the P. & R.

Q. For the Reading Railway?

A. Yes, sir.

Q. Were you a member of the crew on which Riley or Reese was the fireman?

A. Yes, sir.

way at that time?

Q. How long had you worked for the Reading Rail-

A. Three years. Two years up to that time.

Q. How long did you work for them after that?

A. One year.

Q. Had you ever worked as fireman?

A. Well, on and off occasionally; yes, sir.

Q. You remember the night of the accident, do you?

A. Yes, sir.

Q. Will you tell the Court and jury what you know about the accident, what the engine was doing before and what it was doing afterwards?

A. Well, we got orders to get the locals out. We went in what we call the depot, No. 4 house. We got two cars out, and we placed one on the straight iron, straight rail, and I was on the top of the car at the time, and I crossed over, and we placed one on No. 9 track. I put a brake on it, and came down and cut the car off, and we were going back to the depot to get more cars out of there to couple up with what was on the straight rail and go up town with it. Before we got over there the fireman on the engine was getting a drink of water, was getting a cup full or a tea can full of water.

Q. Did you see the accident?

A. No. I didn't see it altogether. I was there after it happened. I was on the back of the engine, and after the engine passed one of the car inspectors hallooed something about a man being hurt, and I looked around, and the fireman was lying there.

Q. What was the last you saw of the fireman Reese before the accident?

A. I saw him on the engine on the footboard leading from the fire box going to the engineer's side, in the act of getting the tin canteen off for water.

Q. What was this tin canteen?

A. A canteen, or a bottle, with a cap on the top.

Q. What was it used for?

A. For the engineer's tea or coffee or whatever he had in it, I don't know.

Q. Which side of the engine was the fireman on when you saw him?

A. On the engineer's side at the time.

Q. That is the right side of the engine?

A. Yes, sir.

Q. Facing the front?

A. Yes, sir.

Q. How long was that before the accident?

A. It was about five minutes. Just from the time I could get down off the car and get the car cut from the engine and started up again. It would be about a matter of five minutes.

Q. Where was the engine at that time when you saw him on the right side?

A. On No. 9 track.

Q. Had it placed the box car yet back on No. 9?

A. Yes, sir.

Q. And was in the act of coming out?

A. We were coming out, and he was getting off the running-board when I was getting down off the car.

Q. What was the engine doing at the time you saw him on the right side?

A. He was standing there. That was after he brought in the car.

Q. On No. 9 track?

A. On No. 9 track.

Q. Just previous to the engine coming out?

A. Yes, sir.

Q. You say you left a car on the straight iron. By the straight iron you mean the western track, the western straight through track on Front Street?

A. Yes, sir.

Q. Who uncoupled the car?

A. The conductor uncoupled the car.

Q. Where were you at that time?

A. On the top.

Q. On the top of which car?

A. I just stepped over onto the front car.

Q. You stepped from the car that was left on the straight iron to the front car?

A. Yes, sir.

Q. Which was attached to the tender?

A. Yes, sir.

Q. Did the engine stop for the purpose of leaving that car there?

A. Yes, sir.

Q. Did the engine stop for the purpose of leaving the car on No. 9 track?

A. Yes, sir.

Q. Who gave the orders to that effect?

A. Well, I suppose the conductor got them from the yard master, and then he issued them to us.

Q. I mean who gave the orders to you men. The conductor?

A. The conductor.

Q. Had Mr. Reese, the fireman, any duties connected with the coupling or uncoupling or placing of cars?

A. Not as I knew of.

Q. What were his duties as fireman?

A. Well, to fire the engine and keep steam up and look out for signals when we couldn't see up on the engineer's side.

Q. Do you know the next duty of the engine when it came out from No. 9 track?

A. To go up and pass over and go in the depot and get the rest of the locals out and couple them to the cars that are on the street, and go up town with them as far as Berks Street.

Q. That was a nightly duty, was it?

A. Yes, sir.

Q. Do you know what the destination of any of those cars was?

A. Well, they call it the Bound Brook Local. That is as far as I know.

Q. Bound Brook, New Jersey?

A. Yes, sir.

Q. Do you know how many of the cars were destined for Bound Brook, New Jersey?

A. I could not tell that. I never saw the way bills.

Q. The engine was coming out for that purpose at the time?

A. That was the purpose at the time.

Q. That was its next duty?

A. Yes, sir.

Q. And, as a matter of fact, did or did it not perform that duty after the accident?

A. It performed that duty after the accident.

Q. Was that the next thing that it did after the accident?

A. The next thing it did.

Q. Had you observed on various nights about what the fireman would be doing at that point and at that time?

A. Well, he was in the habit of making preparations for going north, going up town, getting steam up, getting a good fire, fixing his fire at that time.

Q. In order to take this train up to Berks Street?

A. Yes, sir.

Q. By making preparations to take the train up what do you mean? What preparations?

A. He would get all ready to have a good fire and a good head of steam on.

Q. What preparations would he make?

A. Well, sometimes he would take on water, and some nights it would not be necessary, but then he would start to get the fire ready, get a good fire, and fix his fire.

Q. That is, shoveling in coal you mean?

A. Shoveling in coal and shaking the fire.

Q. Did this tender have a faucet on it, or tap?

A. It had a little tap; a little hole in the side of the tank. It hadn't a faucet.

Q. At what point on the tender was that tap?

A. On the fireman's side, right as you get out; right at the steps of the tender.

Q. On the outside or the inside?

A. On the outside.

Q. How far from the bottom or the floor of the tender was it?

A. A couple of inches, I should judge.

Q. How far back from the opening between the tender and the locomotive was it?

A. About two feet.

Q. How would the water be turned on in that tap?

A. It had a valve at the top of the tank.

Q. Could that be turned on from the inside?

A. That would be turned on from the inside.

Q. In what way would the fireman of an engine get water from that tap?

A. He would have to turn the water on first and then stoop down until he had a cupful. Or any vessel whatever full of water.

Q. With reference to the line of the tender, the outside line of the tender, and the engine, where would his body be?

A. His body would be extending out. He would have to reach around.

Q. You have had experience, you say, as a fireman?

A. Yes, sir.

Q. Will you tell the Court and jury what that tap was used for?

A. Well, I never knew it to be used for anything only for getting water out of it. We would get it to fill

the cooler. We used to have a cooler on the tank at times, and he would fill that.

Q. That is, in the summer time?

A. The summer time.

Q. Water for what purpose? They get the water out of it for what purpose?

A. Get water out of it to drink. I don't know what other purpose they had it on there for. I suppose it was put on there for something, but I don't know what it was for.

Q. Was there any other drinking water on the engine or tender except from that place?

A. Not that I know of, no.

Q. What was the custom of the engineers and firemen with reference to using that tap to get drinking water while the engine was going?

MR. MASON: That is objected to.

THE COURT: He has not testified that he knew of any custom.

By MR. DEMMING:

Q. Was there any custom with reference to using that tap by the engineer and fireman for the purpose of getting drinking water while the engine was in motion?

A. That was the only custom I knew that was used.

Q. Was there any rule or order against that?

A. Not as I know of. I never heard of any.

MR. MASON: I object to that question, and I ask that the answer be stricken out.

THE COURT: I hardly think that is admissible, whether there was any rule or order against it.

MR. DEMMING: If your Honor please, here is a man who had acted as a fireman. I think it is certainly competent for him to testify whether or not he ever heard of any rule or order by the railroad company against using that tap to get water out of it while the engine was moving. He has tes-

tified that there was no other drinking water on the engine or tender except from that place.

THE COURT: I do not see why there should be any order or rule prohibiting a man putting his body outside of the tender to get water while the engine was moving. I will sustain the objection, and grant you an objection.

(Exception noted for plaintiff by direction of the Court.)

By MR. DEMMING:

Q. If the engineer or fireman reached out, extended their bodies out, to get water in the manner you have described would or would they not ordinarily do that in safety?

MR. MASON: I object to that.

THE COURT: The objection is sustained.

(Exception noted for plaintiff by direction of the Court.)

By MR. DEMMING:

Q. Will you kindly stand up and indicate to the Court and jury just in what way a fireman or engineer had to get water from that tap?

A. He would stand up. The valve is up on the top here. He would have to turn around. Say it was here. He had to stoop down this way, get down on the step and stoop this way around to reach it. (Illustrating.)

Q. Where would his feet be?

A. He would place one foot on the step.

Q. On the step leading to the tender?

A. Yes, sir.

Q. And in the manner you have indicated he would lean his body around the corner of the tender?

A. That is the only way he could get it.

Q. And place the bottle or cup underneath the tap?

A. Yes, sir.

Q. Would or would not the fireman sometimes get that water at the request of the engineer?

A. Yes. That is what he was doing then.

Q. That is what Mr. Reese was doing then?

A. Yes, sir.

Q. How long had you worked at that place?

A. I worked all around there for three years. I worked there part of the time, the biggest part of the time. Two years I guess I worked down in that neighborhood.

Q. Two years in the Noble Street yard?

A. Yes, sir.

Q. Before the accident?

A. Yes, sir.

Q. Will you kindly tell the Court and jury what you know, based upon your experience, with regard to the closeness of the tracks at that point?

A. There are about four to five inches of clearance between the cars and the engine. When a car was standing on what we call the westbound track and they were coming around there, they would just clear it four or five inches.

Q. Was the clearance the same at all points?

A. Some places closer.

Q. Can you give us any incidents or occurrences to show how close it was?

MR. MASON: I do not think we are concerned with anything except right here. I have no objection to it, except I do not want to start with something that is going to carry us—we have got a good many miles of track.

MR. DEMMING: The question is directed to this point. I said that.

MR. MASON: I have no objection to it, if it is limited.

By MR. DEMMING:

Q. Can you tell us of anything that has occurred there that would call it to your attention?

MR. MASON: Where?

MR. DEMMING: At or about this point.

A. Well, only at Green Street there, where the cross-over is. The engine would be closer to the cars then, and sometimes engines would pass and take grab-irons off of tanks, or something.

By MR. DEMMING:

Q. Green Street is how far from this point?

A. About sixty feet. Sixty to eighty feet. Eighty feet, I should judge.

Q. North?

A. North.

Q. I do not want you to testify wrongly, of course. The next street north of this point is what street?

A. Green.

Q. The next street north is Nectarine Street, is it not?

A. That does not go through. I am speaking about a street that crosses Front Street.

Q. Nectarine Street is a small street?

A. Yes, sir.

Q. From your experience as a fireman do the cars run smoothly, or do they sway a little in their movement?

A. As a general rule they sway.

Q. That brings them even closer?

A. It brings the tops closer.

Q. And as a result of that swaying what did you say happened along there?

A. Well, if they are moving any way speedy at all, the tops rub.

Q. They rub each other?

A. Yes, sir.

Q. That is, passing cars or trains? Is that what you say?

A. Yes, sir.

Q. How long had you known Reese previous to the accident?

A. Pretty near three years.

Q. What kind of a man was he, so far as his physique was concerned?

A. Well, he was a man that was always working there. I never saw anything the matter with him. He was always in good condition, good physical condition. He was always in good physical condition while I knew him.

Q. Did you ever know him to miss any time by reason of illness?

A. No.

Q. What were his habits?

A. Well, I did not know much of his habits. Only he came there and worked, and he lived in a different direction than me. I only met him around there. He would work and he would go home in the morning, I suppose. I don't know what he would do.

CROSS-EXAMINATION.

By MR. MASON:

Q. You say that the nipple on this tank was about two feet away from the corner of the tank?

A. Yes, sir. From the entrance.

Q. That is, back from the engine?

A. Back on the tank.

Q. Was Reese a big man or a small man?

A. Well, he wasn't——

Q. As big as you?

A. He wasn't as tall as me. He was a man about five feet six, I should think.

Q. As thick as you are?

A. Yes, sir.

Q. Will you just tell us, as you extend your body out there, about what position you would be in to reach two feet? Two feet would bring it to about that fourth rung, wouldn't it? (Referring to witness stand.) Is that about right? (Measuring with steel tape.)

A. Yes, sir.

Q. Just extend your body out to reach that fourth rung, and show us how far you would have to go.

A. My foot would be lower. (Illustrating.)

Q. Your foot would be lower, yes. You have got to swing your body out?

A. About like this. (Illustrating.)

Q. You would not have that sort of a hand-hold, would you?

A. I would have hold of the grab-iron.

Q. About how far out beyond the line of the tender would you extend?

A. About half of my body. (Illustrating.)

Q. You would have a better hand-hold that you have here?

A. I would have a grab-iron.

Q. Your body in that position measures thirteen inches. That covers the overhang of your body, and that is about the position that you would be in? (Measuring.)

A. That is about the position I would be in.

Q. You say that as this car was placed on the straight track after you pulled it out from the freight house, you went from that car over to the car that was to go in on No. 9?

A. We went up and crossed over and came back, back down on No. 9 with the car.

Q. I am speaking of you personally. The conductor cut the car?

A. Yes, sir.

Q. We are now talking about the point where you placed the car on the straight track, the car that caused the accident. Do you remember when that car was placed there?

A. Yes, sir.

Q. The conductor cut that car?

A. Yes, sir.

Q. Where were you?

A. Up on the top of the car.

Q. And you moved from the top of that car over to the top of the other car?

A. Yes, sir.

Q. In that position you saw where Reese was?

A. I couldn't see him until we got over on 9, and then I worked my way up to the brake on the front of the car.

Q. You set the brake on the car that you were going to leave in on No. 9 track?

A. Yes, sir.

Q. And that brought you to what would be the north end of that car next to the tender?

A. Yes, sir.

Q. And in that position was the engine moving in to No. 9 when you first saw Reese, or had it stopped?

A. I was busy with the brake, and when I put the brake on I looked over at the engine and then I saw him standing there getting the canteen off the engineer, and I came down and cut the car off then.

Q. You did not see where he had come from?

A. No. I did not see where he was at all.

Q. After the car was cut off did you go on to the tender?

A. I got on top of the tender.

Q. In that position could you see Reese at all?

A. No. I gave a signal to the engineer, and he went up, and I don't know where Reese was then, or anything about him, until I heard the car inspector halloo that he was injured.

Q. And then you looked out and saw his body lying between the two tracks?

A. Yes, sir.

Q. How long had Reese been working around there with you?

A. He was not working on that crew very long with us.

Q. Two months?

A. About a month, I believe, or two or three weeks.

Q. During that time you were doing general shifting service?

A. Yes, sir. Switching around the yard all the time.

Q. In the course of that two months before the accident you had done about the same things that you did this night, had you not?

A. Yes, sir.

Q. And you placed cars on the straight track at about the same point where this car was placed on other occasions?

A. Yes, sir.

Q. And Reese had been acting as fireman when you did that?

A. Yes, sir.

RE-DIRECT EXAMINATION.

By MR. DEMMING:

Q. I will ask you, so as to make it clear, whether or not you recognize these photographs, and this plan. That plan correctly depicts the location? (Blue print shown witness.)

A. Yes, sir.

Q. With reference to the point of the switch, that is, the beginning of the curve on No. 9 track from the eastern track on Front Street, where the body was found?

A. The body was found lying in front of the car at the north end of it.

Q. And the front of the car with reference to the point of that switch was where?

A. Right above the switch.

Q. The front of the car was above the switch? t is north?

A. The tank rolled his body out around here, and as on the front end of the car, on the north end of it.

Q. Did his body roll all the way along the tank?

A. That I couldn't say. I didn't see it.

Q. Do you recognize these photographs? (Photo- phs 1, 2, 3 and 4 of plaintiff shown witness.)

A. Yes, sir.

Q. They correctly show the scene of the accident, hey?

A. Yes, sir.

Q. Are these tracks on Front Street known as ough tracks or not? They are main tracks, are they?

A. They call them main tracks.

Q. You recognize all those photographs, do you?

A. Yes, sir.

Q. How do they get orders at that point as to the ements of trains or cars?

A. The conductor gets the tickets for the cars, and get verbal orders after the yard master tells him t to do.

Q. Then the conductor gives verbal orders to the nbers of the crew?

A. Yes, sir.

Q. I hand you photograph marked No. 5, being a tograph of a Reading engine. This happens to be 6. I ask you whether that faucet on the tender of t engine is the same as the faucet or tap on the ine 1152?

A. No.

Q. That is a spigot on that engine?

A. That is a spigot.

Q. And on 1152 what kind of an arrangement was

A. That is not the kind of a tank.

Q. It was simply a tap, was it?

A. Yes, sir; a tap. A little hole there on the side. A little piece of iron that the water could spout out of. It was not a spigot.

Q. Was the tap on this engine 1152 about in the same position as the spigot on that engine, or was it further back, or what?

A. It was further back than that.

Q. With reference to the floor of the tender was it about in the same position as that?

A. Yes, sir.

Q. On the tenders that have spigots you turn the water on by the handle of the spigot, but with this tap arrangement you turn it from the inside of the tender?

A. From the top of the tank.

Q. A little wheel or valve?

A. It is not a wheel. It is an egg-shaped valve on the top of the tank. It is just a piece of iron across there, a handle.

Q. On account of the peculiar arrangements of the tracks at this place is or is not the usual order of running trains on these through tracks on Front Street reversed?

A. Yes, sir.

Q. Which way do the trains run on the west track? North or south?

A. I call it north and southbound. You run north and south. You run as far as Green Street when you are going north with the train. With this special train on the westbound track you are running north, and on the eastbound track you are running south.

Q. The tracks run approximately north and south, do they not, on Front Street?

A. Yes, sir.

Q. And there are two tracks, of course, one on the west side and the other on the east side?

A. Yes, sir.

Q. Which way do the trains run on the west track?

A. On the west? They run north.

Q. Which way do the trains run on the east track, the track on the east side?

A. They run south.

THOMAS WALSH, having been duly sworn, was examined and testified as follows:

By MR. DEMMING:

Q. Where do you live?

A. 2138 Leithgow Street, Philadelphia.

Q. What is your business?

A. Engineer.

Q. Who do you work for?

A. Philadelphia and Reading.

Q. How long have you worked for them?

A. Since 1902.

Q. Were you the engineer on Mr. Reese's engine?

A. Yes, sir.

Q. The engine on which he was the fireman?

A. Yes, sir.

Q. How long had he been your fireman?

A. Oh, well, off and on at different times. He had been on for a couple of years before that.

Q. You had known him for a couple of years?

A. He was what they call an extra man, but he had been a regular man on that job then for about a month or so, I guess, or something like that.

Q. How long had he worked at that particular point?

A. Well, he had worked for the company there I guess about three years.

Q. I mean at the Noble Street yard?

A. Well, he had worked in the territory, but he had worked for me there about a month.

Q. Before the accident?

A. Yes, sir.

Q. Will you tell the Court and jury what kind of a fireman he was?

A. Oh, he was a good one.

Q. What was the condition of his health?

A. All right.

Q. A strong, able man?

A. Yes, sir.

Q. Did he ever lose any time on account of illness?

A. Not that I know of.

Q. How about his habits?

A. Oh, he was all right. I never saw any faults with his habits.

Q. Good or bad?

A. Well, they were good habits under working conditions. I never had any fault to find with him.

Q. Will you tell the Court and jury all you know about how the accident happened?

A. Well, we had gone in what they call house 4 and gotten some cars and set one of them out on the street—that is, on the northbound track, on the west track. We had set this car down, and then we went over on No. 9 with the other car. While we were setting that car down on the street the fireman was fixing the fire, getting ready to pull the train.

Q. Which train?

A. The train that we were going to pull up in about half an hour after that. He was getting his fire fixed up. He got his fire fixed up, and we were crossing over with the car to put on No. 9 track, and he came over on my side and asked me for my bottle that I used to carry for water, for the bottle to get a drink, and I told him there had been some water in it, and he took the bottle and he said it was hot. So he threw the water out of the bottle, and then he went to get a drink. Of course, he always brought me back a bottle full after he got a drink out of the bottle himself.

Q. A bottle of fresh water?

A. Yes, sir. The first thing I knew after I came back on No. 9—I backed in on No. 9, and while we were in on 9 he got down off my side and went over on the other side to get the water. So as we were coming out on the northbound track, when I got up to Green Street the brakeman hallooed, he says, "There must be something the matter with your fireman. Where is your fireman?" That is the first I knew that anything had happened to the fireman.

Q. You could not see him at the time he was getting the water, as I understand it?

A. No. He was getting the water on the left side.

Q. Is this the kind of an engine that 1152 was, so far as the construction of the cab is concerned? (Photograph No. 5 of plaintiff shown witness.)

A. Well, the cab is the same. There is no difference in the cab end of it. But the tank is not the same.

Q. It is not the same kind of a tank?

A. No. That is a small tank, and it is not as wide a tank as the other, and the spigot isn't the same.

Q. What was the engine you were running that night?

A. 1152.

Q. Engine 1152, as I understand it, had your house, the house you were in, and the fireman's house, divided by the boiler?

A. Yes, sir.

Q. The cab?

A. Yes, sir.

Q. So you could not see the fireman from your position?

A. No. He was down on the side of the tank getting the water after he went away from me.

Q. Where was your engine at the time he was over on the other side getting the bottle from you?

A. We were coming down on the east track—that is, on the southbound track, with this car to put on No. 9.

Q. Pushing the car at that time?

A. Pushing the car behind us.

Q. At what point was your engine when the fireman left you to go over to get this water?

A. I judge we were on No. 9 track.

Q. Had you started yet to go back?

A. Back north?

Q. Yes.

A. No. He had left before I started to go back.

Q. At the time you left this box car on the straight track, that is, the western track on Front Street, where was the fireman?

A. On the tank fixing the fire.

Q. When he fixed his fire what were his duties? What would he be doing?

A. Well, he had to shake the fire down, he had to put on coal, and of course, naturally you will perspire while you are doing that. You have got to get at the fire, and the fire is hot, of course. You fix it up.

Q. That was a long, hard pull up to Berks Street, was it?

A. Well, it is old rail stuff. You have got to plug at it sometimes. Sometimes you have got to go to get up right. You have got to put the material in there, though, to make sure. You take no chances.

Q. You needed a lot of steam for that purpose?

A. Oh, yes. To get it all right.

Q. Will you tell the Court and jury the duties of a fireman?

A. Well, the duties of a fireman on a locomotive, he has got to always have the engine in condition in regard to steam. He has got to ring the bell and look out for signals when he isn't engaged in firing. Of course, while he is engaged in firing, it is different.

Q. Do a fireman's duties or did Reese's duties have anything to do whatsoever with the coupling or uncoupling of cars or placing of cars?

A. Oh, no.

Q. Will you tell the Court and jury about where this tap or faucet was placed on your engine?

A. Well, it is placed on the side of the tank.

Q. Which side?

A. On the left side.

Q. Outside or inside?

A. Outside. It is on the bottom of the tank about an inch and a half high, and it is around from the grab-iron that he had hold of at least thirty-six to forty inches back.

Q. Whereabouts is the grab-iron?

A. That is the grab-iron on the front end of the tank. That is, not the front grab-iron. On that engine there are two grab-irons. It is sort of midway. Something like this, in walking out (indicating on witness stand). This grab-iron would be like this. This is the grab-iron this way, and this would be the tank. From this grab-iron to the spigot—the spigot would be about where the corner of that step is. It would be about here (indicating).

Q. Can you tell us about how far off from the opening in inches the spigot was? It was not a spigot. It was a tap, was it not?

A. It was a regular nipple.

Q. How far back in inches, about, was it from the opening?

A. Well, the best that I could judge on that, figuring it at the closest, it would be three feet anyhow. It is all of three feet.

Q. In order to get water from that point what position would the fireman have to assume?

A. Well, he would have to get down on the step on the side of the tank, and then lean out. He would hold on with one hand. Of course, he would get down on the step that way and lean down and hold the bottle until he got it filled (illustrating).

Q. Where would he turn the water on?

A. From the top in the tank.

Q. Before he leaned out or afterwards?

A. Before he leaned out.

Q. Was or was it not customary for Reese and other firemen to get water in that way while the engine was in motion?

MR. MASON: I object to that.

THE COURT: The objection is sustained.

(Exception noted for plaintiff by direction of the Court.)

By MR. DEMMING:

Q. Did you ever know of Reese and other firemen to get the water in that way while the engine was going?

MR. MASON: That is objected to.

THE COURT: The objection is sustained.

(Exception noted for plaintiff by direction of the Court.)

By MR. DEMMING:

Q. Was there any rule, regulation or order of any kind whatsoever against a fireman getting water from a tap such as you have described while the engine was in motion?

MR. MASON: That is objected to.

THE COURT: The objection is sustained.

(Exception noted for plaintiff by direction of the Court.)

By MR. DEMMING:

Q. What is the purpose of that tap?

A. Well, the purpose of that tap is to get water out of it.

Q. Water for what?

A. Well, water for anything you want to use it for. In case of a hot box, or in case you want to get a drink, you can get a drink out of it.

Q. Was there any other drinking water on the engine and tank except from that place?

A. That is the only cold water that is on the engine. That is, in the winter time. After the summer months—in the summer months, of course, we have ice water.

Q. Where did you fill the ice cooler from?

A. From the hydrant. From that spigot.

Q. From that tap?

A. Unless we can get it anywhere else. Of course, if we are around the roundhouse we can get it somewhere else.

Q. At the roundhouse?

A. That is sometimes. If it is necessary. If the cooler runs empty we can get it from the spigot.

Q. Is there any rule or regulation with regard to a fireman staying on the engine?

A. A fireman is supposed to stay on his engine, yes.

Q. Where did you and the fireman Reese get your drinking water continually?

A. Oh, well, it never made any difference. I always got it out of that tank, or I sent the fireman to get it out of the tank if I wanted it, if I couldn't get it myself. If I was firing, I always got it myself out of the tank. If I was running and couldn't get it—that is, if I was working, I would send the fireman to get it.

Q. As he did on this particular night?

A. Well, of course, on that occasion he went for himself, but always when he went for himself he brought me one back too.

Q. Will you tell us what you know about the closeness of the tracks at that point?

A. Well, the tracks are pretty close.

Q. What indicated that to you? What ever happened that indicated to you that they were close?

A. Well, naturally on my side—I am running on the right side and naturally if I am on the westbound track—that is, on the northbound track—and cars are on the southbound track, of course, you have got to keep your head in. If you don't keep your head in you don't have any. Of course, the cars lean over, and naturally it is close, and when they lean over sometimes you can get your two eyes out, but more times you can get one eye out, but you have always got to have one eye out to watch for signals.

Q. Did anything else ever happen to show how close those tracks were?

A. Why, I have never gotten any bodily injuries from the closeness myself.

(At one o'clock P. M. court took a recess until two o'clock P. M.)

Mr. Demming: While we are waiting for the witness to come back, I will go a little out of the regular order and put on another witness, if your Honor is willing.

William M. McFadden, having been duly sworn, was examined as follows:

By Mr. Demming:

Q. Where do you reside?

A. 121 West Washington Lane, Germantown.

Q. What is your business?

A. Chief draftsman, Board of Highway Supervisors.

Q. Are you in charge of the records there at the Board of Highway Supervisors?

A. Yes, sir.

Q. How long have you been there?

A. Twenty-three years; twelve years in charge as chief draftsman.

Q. At my request have you gone over all the plans which you have there, filed with you by the Reading Railway Company, with regard to Front Street?

A. Yes, sir.

Q. In the first place, will you explain to the Court and jury what is the purpose of your bureau?

A. We are organized to take care of the records of underground work, railroad track, both trolley and steam, and keep records, and we also approve those plans and recommend the issue of a permit by the Highway Bureau for the breaking of streets.

Q. As I understand, when anyone wishes to make an improvement, we will say an improvement or a change in a street, the plans for that are filed in your bureau?

A. With regard to tracks and underground structures, yes. We do not have the regulation of grades, or anything like that.

Q. But whenever a railroad company or a street railway company wishes to make plans or designs for the laying of tracks in the street, they file the plans for that purpose with that bureau?

A. Yes, sir.

Q. And they are approved by the board and the company then goes ahead with the work; is that correct?

A. Yes, the board approves the plans and then the Highway Bureau issues the permits for breaking the streets.

Q. At my request you have made a search of all the records of your bureau and have found the plans for the laying of these tracks on Front Street at this point?

A. Yes, sir.

Q. What plans are those?

A. Philadelphia and Reading Railway Company re-arrangement of present and laying additional tracks on Front and Noble Streets, July 24, 1897."

Q. That is plan number what?

A. 1490.

Q. That plan was filed when with your bureau?

A. July, 1897.

Q. You have there the plan as filed with your bureau?

A. Yes, sir; approved July 24, 1897.

Q. You say this is number what?

A. 1490.

Q. Was there any other plan or design for tracks on Front Street filed with your bureau by the Philadelphia and Reading Railway Company, the defendant in this case?

A. On November 7, 1896, there was a plan filed, "Philadelphia and Reading Railway Company rearrangement of siding, Front Street below Dana."

Q. That is at this point?

A. Yes, sir.

Q. Nectarine Street was formerly Dana Street?

A. Yes, sir.

Q. What is the number of that plan?

A. That plan is 1398.

Q. That was what date?

A. That was on November 7, 1896.

Q. Since that time has the Reading Railway Company filed any plans at all with your bureau for any change of tracks at that point?

A. I cannot find any.

Q. If there had been any, they would be in your office and under your charge?

A. Yes, sir.

Q. These plans were filed with your bureau by whom?

A. The Reading Railroad.

Q. Were they approved by the bureau?

A. Approved by the board; yes, sir.

Q. And the tracks were constructed, or re-constructed and re-arranged, in accordance therewith?

A. I believe so.

Q. Those were the tracks in existence at that place in 1912, according to the records of your bureau?

A. Yes, sir.

Q. Did your bureau make any changes in these plans? Are there any changes, or were they constructed as filed by the Reading Railway Company?

A. They were constructed as filed, as far as I know.

Q. There is no record of any changes having been made?

A. No, sir.

Q. They are the plans made and filed by the Reading Railway Company itself?

A. Yes, sir.

Q. What do you call these papers (showing witness two papers)?

A. These are the applications.

Q. Signed by the Reading Railway Company, its agents and officials?

A. Yes, sir.

(Mr. Demming offered in evidence the plans and applications. Plans marked Exhibits C and D, and applications marked Exhibits E and F.)

CROSS-EXAMINATION.

By MR. MASON:

Q. Those plans and applications that you identified simply refer to increased trackage by way of additional sidings, and in no way affect the two straight tracks on Front Street, do they?

A. I do not think they do; no, as far as I know.

MR. DEMMING: The plans show that themselves.

MR. MASON: I do not want the witness or the jury to have to read all these plans.

By Mr. Mason:

Q. Do those additions or alterations provided for by the plans that you have identified here, in any way change the two straight tracks on Front Street at that point?

A. No, sir.

Re-Direct Examination.

By Mr. Demming:

Q. When you answer that question, did you look at the plans? The places where the alterations and relocations are made are indicated by red, are they not?

A. Yes, sir.

Q. Do or do not those red lines run part way on those Front Street tracks?

A. They enter the straight track, but they do not affect the straight track at all.

Q. They enter on the straight track?

A. Yes, the switches I suppose you call them.

Q. They enter on the straight track on Front Street between Noble and Nectarine Street?

A. Yes, sir.

Q. Of course, you do not know which is No. 9 track?

A. No.

Q. So, to that extent, they do affect the main tracks on Front Street?

A. Just where the switch is there.

Re-Cross-Examination.

By Mr. Mason:

Q. They were permitted by ordinance after the approval of the board, were they not?

A. I cannot answer that question.

Q. What is the procedure?

A. I suppose that was approved after the ordinance. We would not consider any application with-

out there was authority of Councils or Act of Assembly.

Q. So that all changes upon the city streets are first provided for by an ordinance, approved by the Mayor, and then plans conforming to that ordinance are prepared, and it is the duty of your board to see that the plans presented by the railroad conform to the ordinance of Councils?

A. Yes, sir.

RE-RE-DIRECT EXAMINATION.

By MR. DEMMING:

Q. That ordinance is generally introduced by the parties who wish the change?

A. Yes, sir.

Q. No changes were ordered in those plans by your board?

A. No, sir.

THOMAS WALSH, recalled.

By MR. DEMMING:

Q. At the time the recess was taken, we were speaking about the closeness of the tracks at or about that point. You said no injuries had ever happened to you. I believe that was your last answer. That is correct?

A. Yes, sir.

Q. Did or did not anything happen to cars at or about that point, to indicate to you the closeness of the tracks?

A. Oh, yes; the cars was rubbed, and the cars has rubbed the engine already. I have had to pull my head in, of course, to protect myself.

Q. How about grab-irons?

A. Oh, yes; it has tore off the grab-irons.

Q. That is, when trains pass each other, or at-

tempted to pass each other at that place, grab-irons have been torn off?

A. Yes.

Q. How long did you say you had been an engineer?

A. An engineer since 1906.

Q. In that time has or has not the width of cars, the overhang of cars, increased?

A. Oh, yes; cars are made larger and wider, of course.

Q. How long have those tracks been at that place to your knowledge?

A. I think they have made some alterations on the tracks a few years ago, but they have been there that way since the accident, as far as I know.

Q. No, I mean how long have those tracks been on Front Street, to your knowledge?

A. Oh, they have been there when I was there; that is, they have been renewed. Of course, there were other tracks there, but they have been renewed and new tracks put in.

Q. Do they take over those tracks or sidings all kinds and classes of cars used on the Reading Railway?

A. Oh, yes; all kinds of cars run over those tracks; any car that comes in.

Q. Do you, of your own knowledge, know the width of any of those cars?

A. No.

Q. You never measured any?

A. No.

Q. Can you tell us whether the conditions there were the same in July and August, 1913, as they were in November, the night of this accident, in 1912?

A. In July?

Q. Of the following year, 1913. There had been no changes in the tracks in the meanwhile?

A. No, not that I remember.

Q. You have already said that your engine was going to take the train?

A. Yes.

Q. To take it up to Berks Street. Do you of your own knowledge know where any of the cars of that train were destined?

A. That train?

Q. Yes.

A. No, sir.

Q. Was that a duty which was performed each night?

A. Yes, sir.

Q. Where did those cars go, according to your experience?

MR. MASON: I object. It does not make any difference what happened on other nights, even if he knows. He said he did not know.

THE COURT: No; he can testify as to where the cars on this train would go, or where the cars would go for which the engine was going back, if he knows.

By MR. DEMMING:

Q. Did your engine each night go for these same cars; I mean about the same number of cars and for the same purpose?

A. The same amount of cars, on the same tracks, was handled every night.

Q. And were hauled by your engine to Berks Street?

A. Yes, sir.

Q. It was a regular duty each night?

A. Yes, sir.

Q. And on each night did the same number of cars go to the same points?

MR. MASON: I object. That is the same question.

MR. DEMMING: All right, if you object.

THE COURT: I do not see the relevancy of it, whether it happened on each night or not. There is only one night in question.

By MR. DEMMING:

Q. On this particular night you do not know where these cars were bound for?

A. No, any more than they are called locals. That is all the engineer knows, "Get the locals".

Q. But by locals you do not mean cars used only in Pennsylvania?

A. No.

Q. Local stations on the Reading Railway?

A. Yes, sir.

Q. What was the ordinary, the customary and the usual way for the fireman on your engine to get drinking water?

MR. MASON: I object, unless you limit it. What is the purpose of the question? I object to it, because it is immaterial in the first place. The question as put is totally immaterial.

THE COURT: Yes, unless you show it was a custom that was known to the officials of the road, it would not be relevant.

MR. DEMMING: I intend following that up by asking for how long a period that had been the custom.

THE COURT: I hardly think that question would be material anyway.

(Exception noted for plaintiff by direction of the Court.)

By MR. DEMMING:

Q. For how long a period, to your knowledge, had that been the custom?

(Objected to. Objection sustained and exception noted for plaintiff by direction of the Court.)

CROSS-EXAMINATION.

By MR. MASON:

Q. Reese had been working with you as your fireman for a period of more than a month at this place?

A. Yes, sir.

Q. Did you work there in the day time or at night?

A. Worked there at night time, and he had worked there at day time too, both times.

Q. At Front and Noble Streets, what is the lighting condition at night? Is it light enough to see cars standing on the tracks or not?

A. Oh, yes; they had electric lights there.

Q. You have no difficulty working around there, to see what is going on?

A. Oh, no.

Q. As a matter of fact there is an arc light right at the corner of Front and Noble Streets?

A. Yes.

Q. You said a little while ago that the nipple on this tank, from which the water came, was at least three feet away from the corner of the tank nearest to the engine?

A. Yes.

Q. In order to reach that nipple, how much of your body would project outside of the line of the tender?

A. You would have to really get down on the side of the tank on the step. Your whole body would be out, everything would be out. You would hold on with your left hand and have, say, your left foot on the step. Your whole body would be out. You would be just standing in that position, like this way (indicating). If you had a-hold in this position on the side, your foot would be on the step and you would lean down that way (indicating). Your whole body is out.

Q. So that the entire body would necessarily project outside of the line of the tender?

A. Yes, sir.

Q. You said that, after you had placed this car on the northbound track and made the cross-over on Green Street and came back onto No. 9 track, that Reese came over to you and asked about a drink of water?

A. Yes.

Q. Where was the engine when he first came over to you?

A. I judge the engine would be about on the eastward track, the southbound track, at the south end of the cross-over.

Q. That is to say, you started back from Green Street?

A. Started back from Green Street and came about a car and a half south on this eastbound track.

Q. From your side of the engine could you see this standing car as you passed back?

A. I could not see it myself, no.

Q. Was Reese in a position, as you backed back into No. 9 track, where he could see it?

A. Reese, standing in the position that he was standing for me to hand him out the bottle through the cab window, would have his back at that time evidently against the view of the car.

Q. As you placed the car there, what was there to you, in a position where you could not see what was going on, that indicated that a car was being placed?

A. I did not catch that.

Q. Suppose, for instance, when you pulled out of No. 4 track you had not known that you were going to cut that car off. Was there anything in the motion of the engine that would have indicated that they were cutting a car off?

A. Oh, of course you back the car back, after you pull north of where the car is lying. You had to pull out to clear the switch and the brakeman had to throw the switch, and then you backed the car back about a car and a half on the northbound track, the westward track.

Q. Did you stop in order to let the car be cut off?

A. You have to stop, yes.

Q. What would that motion indicate to anybody familiar with the operation of your engine?

A. Of course, it would mean that the stop was for —if you went ahead again at that time of night, would indicate that you were placing cars, putting cars back on the street.

Q. And was that the kind of a service that you had rendered before at that same point?

A. Yes.

Q. It was customary, in the operation around the yard, to make up this train on that northbound track?

A. Yes, sir.

Q. And to leave cars there from time to time until you got your train made up, was it not?

A. Yes, sir.

Q. You had placed cars at about that same point on other occasions?

A. Yes, sir.

Q. And other occasions when Reese was your fireman, operating on that engine?

A. Yes, sir.

Q. This car that was placed on the northbound track that night; was it placed at a point that the engine and tender and the car that you took in on No. 9, cleared it, or did you scrape it?

A. Of course, that I could not answer, because I would have to be on the left side and Reese would have to be here to testify and he would have to be on the left side to testify, whether the car scraped, because I did not see it myself.

Q. Did you feel anything to indicate that you scraped it?

A. No, sir.

Q. You said that, on certain occasions prior to this accident, at certain points on these tracks, you had

known cars to scrape and taps and grab-irons to be knocked off. Just where did that occur?

A. Oh, well, anywhere. Of course, the Green Street crossing was a very particular place we used to scrape them off. In fact, anywhere south to where this accident happened we would tear grab-irons off.

Q. North or south?

A. That is south of there, and of course sometimes north, just depending on the cars, as they would lean.

Q. What duties did Reese have to perform in the cab; any?

A. When he was in the cab?

Q. Yes.

A. His duty when he was in the cab was to look out for signals and ring the bell; look out for the safety of that side of the engine.

Q. He had the same sort of a position on the left side that you had on the right?

A. More than I was doing the running, and he was telling me how to run, not to go past signals on his side.

Q. As you were coming out from No. 9 track after you had left the car there, had you been given your signals as to what to do and where to go?

A. The brakeman on the front of the engine, of course, gave the signal to go ahead.

Q. Did he ride in front?

A. He rode on the front of the engine; yes, sir.

Q. So he was giving you whatever signals were to be received?

A. Yes, sir.

Q. And there was no occasion then for Reese to get signals from anybody?

A. No, sir.

Q. Was there any duty that Reese had to perform at that time that required him to extend his body outside of the overhang of the tank as you came out on that track?

A. Not that I know of, outside of getting the water.

Q. His duties as fireman at that time, because of your operation of the engine and the position of the brakeman on the front of your engine, were such that they did not require him to get outside of the line of your engine at all?

A. Not any more than I say.

Q. That is true, is it not? I am speaking about his duty; there was no duty?

A. No duty, no.

Q. Absolutely none?

A. No duty.

Q. You have told us that he went outside to get this water because he did not like the kind of water that you had in the bottle and wanted some that was colder?

A. The water was hot that was in the cab.

RE-DIRECT EXAMINATION.

By MR. DEMMING:

Q. You have said that at other times you have also left cars standing on the straight track, that is, on the west track?

A. Yes, sir.

Q. You do not know whether you had ever left a car previously at this exact point?

A. I could not say that, no; not just exactly at that point.

Q. Is there any mark there on the track to mark the clearance point?

A. What do you mean?

Q. Any little block or mark?

A. Oh, no, no. It is a matter of leaving a car for coupling up on a straight iron.

Q. A matter of just leaving a car wherever they choose to leave it?

A. They have got to leave the car there, if they want to couple up on a straight iron. If you put it back toward the house on a curve, you are liable to break an angle cock off, or not to leave it coupled.

Q. But there was room to leave it any place further back or front, just as you chose?

A. Of course that I could not answer, because I was not back there. I was two car lengths away from that.

Q. There was no other car there except that one?

A. That I could not tell you. I would be answering something I would not know, because I did not see what was behind the cars.

By The Court:

Q. How long was it before this accident occurred that the locomotive had made its last stop, prior to the accident?

A. We had just shot around on 9, and when we shot around on 9 with this car and cut it off to leave it there, as soon as we stopped the brakeman was on the step of the car and had his brake applied, and he climbed right down; of course, before we stopped he was down on the back of the engine to cut the engine off, and as soon as he cut the engine off I went. That would be before the accident, I judge about three minutes.

Q. How long before the accident had you left the shed where you got these cars?

A. Running at the rate what you run there, I guess it would be about, from the time of the shed until the accident, I judge would be about eight minutes.

Q. Was there anything to prevent this man getting a drink at any time when you stopped?

A. That part here, if I waited for a fireman to get a drink—we never wait for a fireman to get a drink.

Q. You never do wait for the fireman to get a drink?

A. No.

Q. Was there anything to prevent his getting a drink in the shed before you started out?

A. He was fixing his fire in the shed.

Q. Could he not have gotten a drink while the engine was standing there?

A. As I say, when we were in the shed he was fixing the fire. Of course, he took a drink after he fixed his fire.

By Mr. Demming:

Q. Is there or is there not a rule with regard to the firemen leaving the engine?

A. There is a rule, of course, the fireman is not supposed to leave the engine, that is to go away. Of course, there is not a rule that if the fireman did get off the engine and went to get a drink, he would not be discharged, but of course if an accident happened while he was off the engine, naturally they would look towards him, why he was off. It would be a matter then how the superintendent would take that matter. That is another question.

Q. In your experience, did you ever know of the fireman geting off the engine to get a drink, or did he get the drink on the engine?

A. I have got off myself and got a drink already, off the engine.

Q. How about firemen?

A. I have seen the firemen already. I just could not say that I have seen him get off to get a drink.

Q. It is a very rare thing?

A. Because he was a man that generally drank the tank water. As I say, he was generally a man that was on his job; especially at that time of night, it took everybody on the job to get the engine ready and haul those cars.

Q. In other words, if he left the engine to get a drink he would not be on the job?

Mr. Mason: He has not said that.

By The Court:

Q. If he did not get off the engine to get a drink, but if he leaned around the side of the fender and got it out of that nipple, could he not have done that while the engine was standing, instead of doing it while the engine was in motion?

A. Your Honor, I suppose he took the drink just as he wanted it. He was dry after working on the fire.

By Mr. Demming:

Q. This was right after he had made up the fire to take up the cars to Berks Street?

A. Yes, sir.

Q. How fast were you moving at the time?

A. Oh, we were not going more than about, I judge, five miles an hour.

Q. When you gave that distance of three feet, that the tap was three feet, you measured from where—from the tap to where?

A. From the hand-hold, which you have with the left hand while you are reaching out with the right hand to get the water.

Q. That hand-hold is on the engine or on the tender?

A. On the tender.

Q. Is it at the opening between the tender and the engine?

A. At the opening, yes.

Q. In the inside of the opening?

A. In the inside.

Q. How far does that hand-hold or grab-iron extend out from the tender?

A. Outside?

Q. Yes.

A. That is just on a line with the tender.

Q. It is a piece of iron constructed like that (indicating), is it not?

A. It is the plate of the side of the side of tank with a piece cut out of it for the man to grab hold. Instead of the plate coming up flush to the end on that order (indicating), there is a piece cut out and you grab hold there, and then of course right there there is another one.

Q. How large an opening is that?

A. There is an opening there, I judge it would be about four inches.

Q. Did you actually measure the distance to that tap, or are you estimating or guessing?

A. I am just taking it figuring; I worked on a rule at one time myself.

Q. You are estimating, are you?

A. Yes; I never measured it right off.

Q. The arc lights that you have spoken about in answer to Mr. Mason are on the other side of where this car was stationed, are they not?

A. Yes, sir.

Q. Do you recall whether this was a foggy or a misty night?

A. I could not remember that it was a foggy night.

PATRICK JOHN REILLY, having been duly sworn, was examined as follows:

By MR. DEMMING:

Q. You do not spell your name the same as Mr Riley did who was killed?

A. No, sir.

Q. Are you any relative of Riley?

A. No, sir.

Q. Where do you live?

A. 2406 North Leithgow Street, Philadelphia.

Q. What is your business now?

A. Fireman.

Q. You are a stationary fireman, are you?

A. Yes, sir.

Q. Where do you work?

A. McNally's Morocco Works.

Q. That is on or near Columbia Avenue?

A. Dock and Columbia Avenue.

Q. At the time of this accident what were you working at, in November, 1912?

A. I was working as fireman for the Philadelphia and Reading Railway Company.

Q. That is, you were a locomotive fireman?

A. Locomotive fireman.

Q. Did you know Mr. Reese in his lifetime?

A. Yes, sir; I knew him.

Q. Will you tell the Court and jury what kind of a man he was, so far as his physical well-being was concerned?

A. I had known the man for about three years and always found him a good, sober, happy, ablebodied man.

Q. Did you ever know him to be sick?

A. No, sir.

Q. Did he have good or bad habits?

A. Good habits, to my knowledge.

Q. You did not see the accident, did you?

A. No, sir.

Q. Where were you working that night? Did you work at day time or night time?

A. I was working night time, I believe, but I believe I was at Erie Avenue that night.

Q. What was your engine?

A. I do not recall just right. I think it was 1329 I was firing that night. I think I was at Erie Avenue.

Q. 1329?

A. Yes, but I would not be sure.

Q. You had a different engine at different times?

A. Yes, I was working extra list and I was on a different engine nearly every night in the week.

Q. How long were you a fireman for the Reading Railway Company?

A. Over six years.

Q. Do you know of these taps or spigots or faucets on the tank?

A. Yes, sir; I am aware there is one there.

Q. Do you know this engine 1152 that Reese was fireman of?

A. Yes, sir.

Q. Will you explain to the Court and jury what these spigots were, where they were located and what they were used for?

A. I have always used that spigot for drinking purposes, or for getting water for any purpose necessary, and that spigot would be about, I judge, from the grab-iron that you hold on to get on the tender, I judge about three feet, it may be thirty-six or thirty-seven inches from the grab-iron, or about that, in my best estimation.

Q. Where was it placed on the tender; what part of the tender?

A. On the front of the tender on the left side.

Q. On the outside?

A. On the outside.

Q. How far above the floor of the tender?

A. I judge it would be about two inches.

Q. Was it used for any other purpose outside of getting drinking water for the engineer and fireman?

A. Not that I know of; no, sir. It might be used sometimes by the engineer, the fireman or a brakeman, if you had a hot box or something on the train, to get a bucket of water out of to use for that purpose.

By The Court:

Q. How would they drain the tank, if they wanted to get the water out of the tank?

A. You could drain the tank by taking down the connection hose which you feed the boiler with.

Q. You could not drain it through this spigot?

A. Oh, no, sir.

By Mr. Demming:

Q. Had you ever worked about the Noble Street yard?

A. Yes, sir; I worked there on and off.

Q. Tell us what you know, if anything, about the closeness of those tracks.

A. They are pretty close; that is, on the main tracks on Front Street they are pretty close. They are so close you cannot put your head through the cab window. That is, I would say from Green Street down, anyhow.

Q. From Green Street south?

A. From Green Street south I would not want to have my head out through the cab window; no, sir. They are very close there.

Q. And you worked on and off there for how long?

A. Seven years.

Q. These two tracks on Front Street are known as main tracks, are they?

A. Yes, sir; always known to me as main tracks.

Q. How are they used with reference to northbound and southbound? Which is the northbound, the western track or the eastern track?

A. The eastern track. The northbound was used for going north and the southbound is used for southbound stuff coming from Berks Street.

Q. Yes, but the usual order is reversed, is it not, on Front Street? That is, they go northbound on the western track and southbound on the eastern track; is not that right?

A. Yes, sir; on Front Street.

Q. Do all kinds and classes of cars used on the Reading Railway go down over those tracks and out on those sidings and switches?

A. Yes, sir; as far as I know.

Q. According to your experience, what was the customary, the usual and the ordinary method employed by the fireman to get drinking water from this spigot or tap or faucet?

(Objected to. Objection sustained and exception noted for plaintiff by direction of the Court.)

Q. For how long a time was that the custom or the general mode of getting the water?

(Objected to. Objection sustained and exception noted for the plaintiff by direction of the Court.)

CROSS-EXAMINATION.

By MR. MASON:

Q. You said that the tracks on Front Street south of Green were so close that you would not like to take a chance of putting your head out?

A. No, sir.

Q. You mean out of the cab window on the fireman's side?

A. Yes, sir.

Q. They were so close that you could see that if you did that you might have trouble; is that right?

A. Yes.

Q. There was nothing hidden about the fact, was there? You could see just how close the tracks were and just how close the cars came together?

A. Yes, sir.

Q. You did not have to be working around there very long before you found that out, did you?

A. No, sir.

RE-DIRECT EXAMINATION.

By MR. DEMMING:

Q. You learned that in seven years' experience?

A. Yes, sir.

RE-CROSS-EXAMINATION.

By MR. MASON:

Q. After the first day you never stuck your head out on that side of the train, did you?

A. No.

JOHN I. RIEGEL, having been duly sworn, was examined as follows:

By MR. DEMMING:

Q. Where do you live?

A. Scranton, this State.

Q. What is your business?

A. Consulting engineer.

Q. Will you tell the Court and jury what experience you have had?

A. I graduated as civil engineer in 1892 and entered railroad service in 1893, and continued until 1909, for the Lehigh Valley, the New York Central, the Delaware, Lackawanna and Western and the Delaware and Hudson Railroad Companies, and at other times since 1909 I have been engineer on various railroads and on investigations of accidents and on improvement of tracks, etc., and also have been engaged by the Interstate Commerce Commission on several investigations. I am now engaged in the elimination of grades through the City of Scranton, involving sixteen grade crossings, for the Delaware and Hudson Company.

MR. DEMMING: Do you wish to cross-examine as to qualifications, Mr. Mason?

By MR. MASON:

Q. You said you were a consulting engineer?

A. I am, yes, in private practice.

Q. You used to be a real engineer and did real hard work, did you not?

A. I did ample hard work in my time, yes. I was clearance engineer for the Lehigh Valley quite early, and for the New York Central up to 1902; also for the Delaware, Lackawanna and Western Railroad Company in 1903.

MR. MASON: No further questions. There is no doubt about Mr. Riegel.

By MR. DEMMING:

Q. Did you make an inspection and survey of these tracks and the conditions in the Noble and Willow Street yards of the Philadelphia and Reading Railway Company at my request for this case?

A. I did, in July, 1913.

MR. DEMMING: The testimony has been that there was no change between the time of the accident and July, 1913.

By MR. DEMMING:

Q. Did you take these photographs which I show you?

A. Yes, I did.

Q. Will you identify each photograph by number and tell the Court and jury what they show?

A. No. 1 is a view of the tracks on Front Street, a trifle north of Noble Street, showing on the right the tracks leading to freight houses 3 and 4, on the left leading to freight house 6, and down toward the wharves on the east of Front Street, and straight ahead is what has been called the straight track or main track, turning to the right and then finally to the left beyond freight house No. 6.

No. 2 is a view of the same territory, looking in the opposite direction, that is, to the northward up Front Street, from a point in the middle of Front Street a short distance below what has been called the point of the accident.

No. 3 is simply taken to show the leads or the upper ends of the switches, which includes track No. 9, in the direction from Noble Street eastward to the wharves or piers.

No. 4 is a view very similar, that is, covering the same situation as No. 2, and shows the tracks in Front Street near the point of the accident from the top of the freight house steps, the office steps. It shows house No. 6 and the tracks leading down toward No. 9 on the right and the tracks immediately leading in No. 3 and 4 on the left.

No. 5 is a photograph of engine No. 1197, showing a spigot instead of a faucet at the front end of the tender, between the engine and the tender.

Q. You have already said you made an inspection and survey of the tracks at this point?

A. Yes, I did.

Q. What are those tracks on Front Street called, in railroad parlance? Are they main tracks?

A. They are, in engineering terms and in operation also, called main tracks; tracks upon which the traffic is moved after it is made up.

Q. I will hand you a blue print marked "Plaintiff's Exhibit B", and ask you, in the first place, who made that.

A. I did, made it according to my notes of surveys taken in July, 1913.

Q. Will you hold that up and explain to the Court and jury what that represents?

A. The location of the tracks of the Philadelphia and Reading Railway Company in the vicinity of the accident. Beginning near Green Street, the two slightly shaded sets of parallel lines are the main tracks, extending southward until we reach opposite a point marked "House No. 4", where we have a number of tracks—or rather a single track—leading there to the rear of house No. 6. Slightly to the north of this

are a series of tracks leading off of the northbound track into a track which has been called No. 9. At the top of the map near the center are a series of tracks leading into house No. 4, northward a little into house No. 5, and southward at another point leading into house No. 3, marked simply "freight house" on this one.

Q. Just point out to the jury where the place of accident was there.

MR. MASON: He does not know.

By MR. DEMMING:

Q. Where does track 9 come in connection with the two tracks on the east side of Front Street? Is there anything to indicate it there?

A. Yes, at the point marked for spacing of tracks "10 feet 4¾ inches". There is a series of figures close together, a lot of white figures, and "10 feet 4¾ inches" is where No. 9 begins to lead off, as well as all the other tracks leading to that yard lead off the northbound track. It is a short distance south of the crossing from the north track for the switch which leads into the Philadelphia Warehouse Company's building on the east.

Q. Where do those tracks lead to, the No. 9? Where do they eventually lead to?

A. Into a switching yard, a sorting yard, and also team tracks which are east of Front Street and in the vicinity of Noble Street crossing near Delaware Avenue.

Q. Any wharves or piers?

A. There are some; I believe that there are some of those tracks that lead off onto a pier from the northbound track, but the switch track which leads from the south track does lead to one of the piers.

Q. At the place where this accident happened, in engineering terms would or would not that be called about the point of the beginning of the yard?

MR. MASON: I object to that question, because, so far as I know, the witness has not identified the place of the accident, and he is asking a question that is not covered by the witness's knowledge.

THE COURT: Other witnesses have identified the place. I suppose he is referring to the place other witnesses said the accident occurred.

MR. MASON: All I want to do is to have it identified on the plan or to have Mr. Riegel say he had the place pointed out to him.

MR. DEMMING: I understood Mr. Riegel to say that a while ago.

THE WITNESS: As I understood the testimony, the south end of the car was placed opposite the point of frog which leads into No. 9. That would place the lower end of the car where I have marked the tracks 12 feet. The upper end of the car then would be about 37 feet to the north of that point, where the tracks would be parallel, and therefore on the main tracks. The car was standing on the tracks at the point at which they are very nearly parallel, that is, straight and parallel.

MR. DEMMING: Do you agree with that, Mr. Mason?

MR. MASON: No.

By MR. DEMMING:

Q. Did you take measurements there to find the distance between the tracks?

A. I did. I took the spacing at four points, which I have marked on this map.

Q. What did you find that distance to be?

MR. MASON: Where?

A. At the north I measured at Green Street, where I found the spacing from center to center, center of one track to the center of the other track, 10 feet 4 inches. On the south line of Nectarine Street I found the spacing was 10 feet 6 inches. At the point of switch

leading off into No. 9 track I found the spacing 10 feet 4¾ inches. At the point of frog of this track leading to No. 9 track, or in other words the lower end of the northbound main track, I found the spacing to be 12 feet 0 inches. Following that I measured at several places and found the tracks wider apart, that is, the tracks diverging into the yard.

By Mr. Demming:

Q. At the point you measured nearest to where the accident occurred——

Mr. Mason: I object to that form of question, because the witness by his answer has clearly not measured at the point of the accident. Therefore, if Mr. Demming will fix measurements by points that are physically present and that the witness confine his testimony to that, I will not object.

By Mr. Demming:

Q. At the place where you have marked the northern end of this car was on the straight track, on the western track, what was the distance from center to center between the two tracks?

A. Scaling from the map it is 10 feet and 7 or 8 inches spacing, between 7 or 8 inches.

Q. Scaling from the map?

A. Yes.

Q. Did you make any measurement at that point?

A. I did not. I made a measurement north of that at the point of switch, where I found the spacing was 10 feet 4¾, and the first spacing south, where I got 12 feet and the spacing I was looking for was at the point of frog.

Q. Of course, a measurement made on the ground is more accurate than a scaling on the plan?

A. Yes; that is, you can be more positive of it. A plan that is accurately made, of course, can be scaled to within an inch.

Q. The place where you measured it is how far north of the place where you scaled it on the plan, the point of frog? About how far?

A. About 6 or 7 feet north.

Q. According to the plan at that place it scales how much from center to center, at the north end of this star?

A. Ten feet and 7 or 8 inches.

Q. That would bring the distance between the tracks, that is, from the outside of the rail of one track to the nearest point of the rail of the next track, how much?

A. About 5 feet 5 inches; perhaps 5 feet 6 inches.

Q. That is the distance from one track to the other?

A. It is, yes; from outside of rail head to outside of rail head.

Q. Did you measure the width of the tender of this engine 1152?

A. I did, yes; found it to be 10 feet 5 inches over the grab-irons and rivet heads, etc.

Q. Is there a standard distance on main track, such as this is, in railroad practice, from center to center?

A. There is, and the Reading standard since 1901 is a spacing 13 feet for main tracks and 13 feet centers for first side track off of main tracks.

Q. What was the other distance you gave?

A. Also the distance between centers of first side track paralleling main tracks.

Q. As an engineer, what are these tracks at this point?

A. At the particular point of the accident they are the main tracks, and a short distance from there they are specified as yard tracks, the yard, in both construction and maintenance.

Q. Therefore, taking the standard which you say is Reading's own standard since what time?

A. Since 1901.

Q. What is the standard distance from one track to another, that is, between tracks, between the rails of adjoining tracks?

A. Seven feet 9½ inches.

Q. Let us see how you get at that. The gauge of the track is how much?

A. Four feet 8½ inches.

Q. That is from inside of rail to inside of rail, the width of the track itself?

A. Yes.

Q. How much do you allow for the width of the rails?

A. Two and a half inches, or slightly over.

Q. That is 5 inches?

A. Five inches.

Q. Therefore you subtract from 13 feet, 4 feet 8½ inches, do you, and 5 inches?

A. And 5 inches additional.

Q. And you get how much as a standard between tracks?

A. Seven feet 11½ inches, instead of 9½.

Q. I got it 7 feet 10½.

A. Ten and a half is correct; yes.

Q. Are you familiar with the overhang of the cars on the Reading system?

A. Yes, I know the width of their equipment, in fact I have tables that they authorize for our use, showing the width of their equipment, and also have the car line clearances which they have published in a standard publication monthly.

Q. By "they" you mean the Reading Company?

A. The Reading Company, as well as other companies.

Q. What is the overhang of their different styles of equipment?

A. They have cars that are 10 feet 1¾ inches wide, or say, allowing for lean and the like, 10 feet 2 inches

wide, leaving the overhang over rail 2 feet 1¾ inches on each side, overhanging outside of the rail.

Q. That is, allowing a width of the top of the rail of 2½ inches, is it?

A. Yes, 2½, a little over; about 2⅝.

Q. You found the width of the tender of this special engine, 1152, 10 feet 5 inches?

A. I did; yes, sir.

Q. According to the conditions as you found them there, could two of those tenders pass each other without striking?

MR. MASON: That would depend upon where you put them.

MR. DEMMING: At the point of the frog.

A. At the point of the frog they could pass readily, yes. They could pass at the point of the accident also. The spacing there is 10 feet 7 inches, whereas the maximum width, the center of both equipments, is 10 feet 3½ inches.

Q. A clearance of how much?

A. The clearance then would be 3½ inches, perhaps 4½. This is scaling from the map.

By THE COURT:

Q. That is the overhang of the top of the cars, is it?

A. Yes, that is the overhang at the top; about 9 feet in height.

By MR. DEMMING:

Q. Are you speaking about the tender now or a car?

A. The tender passing a car at the point marked as point of accident.

Q. Would leave a clearance of how much, you say?

A. Three and a half to 4½ inches, depending on the scaling of the map.

Q. According to the standard of the Reading itself, how much ought that clearance to be at that point?

MR. MASON: I object to that question. He can testify as to what the clearance would be according to standard. He cannot fix what is our duty at this point.

THE COURT: You did not intend to have him state what was the duty of the company, did you?

MR. DEMMING: No, I wanted him to make that calculation.

THE COURT: You want to know what the standard clearance would have been?

MR. DEMMING: Yes.

THE WITNESS: The standard clearance, 2 feet 10 inches, for that class of equipment.

By MR. DEMMING:

Q. At that point?

A. Yes.

MR. MASON: That is objectionable, and I ask, if the answer is to the question originally put, that it be stricken out. The witness gave a proper answer to a proper question, but Mr. Demming is injecting into it something else.

THE COURT: "At that point."

MR. MASON: Yes.

THE COURT: He cannot testify as to what the standard of clearance is at that point, only what it is generally, Mr. Demming. I do not see that it makes very much difference, but I think you are asking the witness to testify as to what the duty of the company was at this point. You have shown what the general condition was.

MR. DEMMING: I did that, if your Honor please, because Mr. Mason has hitherto insisted that we confine it to this particular point where the accident happened. I do not care.

By MR. DEMMING:

Q. Take it at just that point and say what the standard clearance should be.

THE COURT: No, what the standard clearance is.

THE WITNESS: The standard clearance for this class of equipment, 10 feet 2 inches wide, is 2 feet 10 inches. They also show in car line clearances that they can take a lading 10 feet 6 inches wide, making their minimum standard clearance 2 feet 6 inches.

Q. By "them" you mean the Reading Railroad?

A. I do.

By MR. DEMMING:

Q. I show you plans which have been produced here by the Board of Highway Supervisors, filed with them by the Reading Railroad Company in 1896 and 1897, for re-establishment or re-location of tracks on Front Street at this point, and ask you whether those plans show a rearrangement and relocation of tracks at this particular point where according to the evidence the car was standing and where the accident there happened; do they or do they not?

A. The plan shows a new arrangement of tracks which would afford and does afford by the new arrangement an increase in clearance of spacing of tracks at about this point of the accident there what it was there formerly, but they also show a track, a side track in addition which if opened would leave less clearance,— No. 9 and track deposed.

Q. Do they cover that point of the main tracks on Main Street?

A. They do, they about change at this point on the main tracks, which I do consider would be an improvement and yet not lead to standard,—1912.

Q. Are you acquainted with the spigots or taps or faucets on the tenders of the Reading Railroad locomotives?

A. I have observed them for quite a number of years, yes. I have seen some of these on the Reading here, photographs.

Q. You made this photograph of engine 1697?

A. Yes.

Q. That is a spigot, that is not a tap?

A. That is a spigot.

Q. Do you know for what purpose they were used?

A. For the purpose of supplying water to the train men and have always been so used since they were placed.

Q. Drinking water?

A. Drinking water, yes, and washing hands and the like.

Q. Are they in general use?

A. They were formerly, yet they have been discarded by many railroads in the last five to seven years.

Q. Do you know why they were being discarded?

MR. MASON: That is objected to as having no bearing on the case.

(Objection sustained. Exception noted for plaintiff by direction of the Court.)

Q. Will you explain to the Court and jury what you mean by clearance? You say you have been a clearance engineer. Tell us outside of technical language what that means.

A. One who measures the distance from track to destination, the spacing of tracks and the like over a road and then establishes what they call the car line clearances. The object of it is to show what lading can be between certain junctions of his road, or of the whole road, and that result finally is tabulated and sent out to other roads, so that anyone who knows how to read the tables can indicate to the car service or car department what lading can be taken, whether or not a certain lading is safe to pass over a certain road bed, reach a certain destination. The tables are worked out by standards which are more or less uniform. They are all very nearly the same, however, for train service, which specify 9 inches clearance to movement or sway-

ing, irregularities of track, unevenness of surface during the year, cold and warm weather, between main tracks and 4½ inches between passing cars on side tracks. In fact, the main line clearance between cars is 4½ inches, allowing for the swaying of the other car.

Q. You mean the cars do not roll along steadily but sway from side to side?

A. Sway from side to side, very frequently depending on the evenness or smoothness of the roadbed, condition of the weather, and the like, which of course makes a variation in the elevation occasionally and curves are not elevated uniformly.

Q. Are clearances adopted with reference to the safety of the employees themselves?

A. The spacing of tracks and lading to yards and the specification of the first side track shall be 13 feet, or whatever the road standard is, is with the idea of safety, so that men can operate and work between the tracks and convey signals and the like and be safe for main line traffic.

CROSS-EXAMINATION.

By MR. MASON:

Q. You mean men working on the ground?

A. Working on the ground or on the trains, so as to lean out of the gap and also get their signals.

Q. I do not quite understand your reference to this plan, map dated April 10th, 1897. Will you tell me in what way the clearance between the straight tracks on Front Street is affected at all by these proposed improvements which we would understand were put in in 1897?

A. The white parallel lines show the old condition of the tracks which is to be supplanted by the system of tracks shown by red lines or red shading, and between and at the point of the accident the new tracks are at a greater distance from the northbound or

straight track than the old tracks were or at least are shown to have been.

Q. That increase in clearance is on the line of the curve which with the cross-overs leads into No. 9 track?

A. Yes, it is.

Q. So then it is an extension of the straight track, there is no change in the straight-away after all?

A. No change in the spacing or anything else. It is indicated that the new tracks start from the old tracks shown by the parallel white lines, but some are to the north of where the straight line formerly ended.

Q. Will you tell me again what is the standard clearance between the outer line of a tender, of the usual width, and another tender of the same width on the opposite track?

A. A tender of the usual width is only about 10 feet 2 inches.

Q. Did you measure the tender attached to 1152?

A. I did, and found it 10 feet 5 inches.

Q. What is the usual width of a box car?

A. There is about 9 feet 11 inches, 9 feet 10 inches, but the Reading has a number in service that are 10 feet 1¾ inches.

Q. You do not know anything about the size of the box car that was standing on this northbound track at the time of the accident?

A. I do not.

Q. Both cars—take the average width car, and then take the larger car and tell me what the standard clearance would be, or rather what the clearance would be upon two tracks having a standard clearance?

A. As I stated in direct examination, the lading that your road permits is 10 feet 6 inches. Taking that with the standard spacing of tracks would leave a clearance of 2 feet 6 inches between cars—between ladings.

Q. And between the tender of that width and the car 10 feet 3 inches wide?

A. Two feet 8½ inches.

Q. You have spoken of main tracks and side tracks and yard tracks, what do you mean by a yard?

A. A yard is a system of tracks in which sorting is done preparatory to making up a train and making up the train is usually provided on a side track parallel to the main tracks, where the room is afforded.

Q. And in the large cities of your experience, the so-called main tracks or tracks upon which a train after it is made up is moved, when they are within the yard limits are used in just the same way as the other yard tracks are used, are they not?

A. No, they are not used the same way, they are not used for standing cars or anything of that kind. They are often used for making up trains and doing some of the shifting.

Q. They are at the terminal yards, are they not?

A. For shifting, yes, and making up the trains, and especially tracks in streets, they must be so used.

Q. And within the yard limits they are subject to the orders of the yard master and all movements are by verbal orders, there are no train schedule movements inside of those terminal yards, are there?

A. Oh, no; no schedule movements, but they are all under the control of the superintendent, all those movements must be made.

Q. Of course, but the method of giving instructions is under the control of the superintendent, the actual movements of the car is subject to the verbal directions of the yard master from time to time, is it not?

A. Usually so, but as a rule he must consult with the dispatcher before he does send out his movement, or let him know that he is about to do so.

Q. You are referring to a movement of a track that is made out of that yard?

A. Yes.

Q. Will you refer to what I am talking about, which is the yard movements of cars that are not made up into a train for a through movement, and the placing in movement of cars from track to side track and backwards and forwards, is all subject to the instructions of the yard master given to the various conductors in charge of those shifting trains?

A. That is right, within places marked as yard limits.

Q. Have you any personal knowledge as to whether or not the tracks at the point where this accident occurred are within the yard limit?

A. I have personal knowledge.

Q. And you know that they are within the yard limits?

A. Within the yard limits, yes.

OSCAR J. FREY, sworn.

By MR. DEMMING:

Q. Where do you live?

A. 902 Erie Avenue, Philadelphia.

Q. You are employed by the Reading Railway, are you?

A. Yes.

Q. In what capacity?

A. Yard master.

Q. Have you under your charge the Front and Noble Street yards?

A. At night, yes.

Q. You have heard the testimony in this case that this engine was going to get about five cars to take them up as a train to Berks Street on this particular night, on November 18th and 19th, 1912. You have heard that, have you not?

A. Yes, sir,—more than five cars, though.

Q. How many were there?

A. Fourteen (Referring to paper)—twenty cars.

Q. Where were those cars destined for?

A. Different points.

Q. Tell us; take one car at a time.

A. One to Wayne Junction shop; Newtown Branch, Newtown, Pennsylvania; one Berks Street shop; one to Weston, Pennsylvania; Langhorne, Pennsylvania; Edgehill and Way, Pennsylvania; Sharon and Way, Pennsylvania; Northeast Branch, Pennsylvania; Park Junction, Pennsylvania; Berks Street shop; Wayne Junction transfer, Pennsylvania; Newbury Junction, Pennsylvania; another one for Park Junction; Johnsonburg, Pennsylvania; Anderson, Indiana; South Bethlehem, Pennsylvania; Newberry Junction, Pennsylvania; Reading, Pennsylvania; another, Reading, Pennsylvania; another, Newberry Junction.

Q. So out of the entire twenty there were two bound for points outside of the State of Pennsylvania?

A. Yes.

Q. Just two that you read?

A. Yes.

Q. That was the next duty of this particular engine, to take those up to Berks Street?

A. After the accident, yes.

Q. After they left that car on track 9?

A. Yes.

Q. It was going to do that at the time of the accident?

A. Some of these cars were made up at that time. They were going to get five cars after the accident.

Q. That is the next duty this engine performed, to take these cars up to Berks Street?

A. Yes.

CROSS-EXAMINATION.

By MR. MASON:

Q. This crew of which Reese was a member, simply carried these cars as far as Berks Street?

A. Yes.

Q. And they came back and did some more work?

A. They brought another train back.

Q. They had nothing to do with the cars after they got to Berks Street?

A. No.

Q. They simply carried them from your yard up to Berks Street yard?

A. Probably switched them and classified them into trains.

Q. Those cars when they left your yard, were not made up in a train that was going through beyond Berks Street, were they?

A. No.

Q. They were to be carried to Berks Street and then classified into trains that were going to take them still further?

A. Still further.

Q. So that maybe each one of these cars would be in a different train by the time it got out and got started?

A. Quite likely.

RE-DIRECT EXAMINATION.

By MR. DEMMING:

Q. You say this engine would probably switch them and classify them in the yard at Berks Street?

A. Yes.

Q. Then you take each one of these cars and put them in the train where it belonged?

By MR. MASON:

Q. Do you happen to know that of your own knowledge?

A. No.

MR. MASON: Then I object to your testifying.

MR. DEMMING: The other time this case was tried your Honor made a suggestion that certain witnesses produced on behalf of the plaintiff from the city,—the evidence which those witnesses gave, was more probably to facts of rebuttal testimony than evidence in chief. Considering the question, I think that your Honor was right about that and I do not propose offering them as part of the plaintiff's case in chief. Therefore I retain them in rebuttal, at least if there is any such defense.

I therefore offer in evidence these photographs, showing a group of railroad men, including Mr. Reese, the dead man, the second one from the left; and the photographs which have been identified, Nos. 1, 2, 3, 4 and 5.

MR. MASON: There is one of these photographs I object to, that is engine 1197. It cannot have any possible effect except to mislead.

MR. DEMMING: Simply showing the location of the cab, how the cab was constructed. If my friend objects I do not insist.

MR. MASON: It is misleading on the other point.

MR. DEMMING: If you will notice, in order to get to the engine, the engineer has to go around the end of the engine and get up on the running board on the opposite side, and cannot see over the end of the tank. It was only for that purpose.

I also offer in evidence the sketch or blue print of a survey made by Mr. Riegel, marked Plaintiff's Exhibit B. The letters of administration have already been offered in evidence.

(Plaintiff rests.)

(Defendant moves for nonsuit.)

(The Court adjourned until Tuesday morning, February 9, 1915, at 10 o'clock.)

Philadelphia, Tuesday, February 9, 1915.
10 A. M.

Present: Parties as before noted.

THE COURT: Gentlemen, in this case, after a careful consideration of the evidence, I have come to the conclusion that I will have to enter a nonsuit on the ground that the injury did not occur within the scope of the fireman's employment. There is no evidence of negligence or neglect to provide him with a safe place to work as to the act he was performing at that time.

Gentlemen of the jury, you are discharged from further consideration of this case.

And thereupon, the counsel for the said plaintiff did then and there except to the decisions of the trial Judge, to certain rulings and to the rejection and exclusion of certain testimony offered on behalf of plaintiff and aforesaid charge and opinion of the said Court, directing a nonsuit to be entered and refusing to take off said nonsuit, and inasmuch as the charge and opinion and refusal to take off nonsuit, so excepted to, do not appear upon the record.

The said counsel for the said plaintiff did then and there tender this bill of exceptions to the opinion of the said Court, and requested the seal of the Judge aforesaid should be put to the same according to the form of the statute in such case made and provided. And thereupon the aforesaid Judge, at the request of the said counsel for the plaintiff, did put his seal to this bill of exceptions pursuant to the aforesaid statute in such case made and provided, this twenty-seventh day of April, 1915.

J. W. THOMPSON (L. S.)
Judge.

ORDER OF COURT.
(Filed April 22, 1915.)

Before Thompson, J.

And now, to wit, this twenty-second day of April, 1915, it is ordered that the plaintiff's motion to take off the nonsuit in the above entitled cause be, and the same is hereby refused.

By the Court,

Attest:

GEORGE BRODBECK,
Deputy Clerk.

ORDER OF COURT.
(Filed April 23, 1915.)

And now, this twenty-third day of April, 1915, the Court hereby allows the plaintiff an exception to the refusal of the Court to take off the nonsuit entered by it in the above case.

J. W. THOMPSON,
Judge.

PRAECIPE FOR JUDGMENT.
(Filed April 24, 1915.)

To Clerk of United States District Court:

Enter judgment in favor of defendant in above entitled case.

WM. CLARKE MASON,
Counsel for Defendant.

JUDGMENT.
(Filed April 24, 1915.)

Before Dickinson, J.

And now, this twenty-fourth day of April, 1915, in accordance with praecipe, filed judgment of nonsuit is entered in favor of the defendants and against the plaintiff in the above entitled case.

Attest:
LEO A. LILLEY,
Deputy Clerk.

ASSIGNMENTS OF ERROR.
(Filed April 27, 1915.)

Plaintiff in error files the following assignments of error:

1. The learned trial Judge erred in refusing to allow plaintiff to prove at the trial the customary and usual methods employed by fireman and engineers on locomotives belonging to defendant in obtaining drinking water from the faucets, taps or nipples on the sides of tenders attached to such locomotives.

2. The learned trial Judge erred in refusing to allow plaintiff to prove at the trial the length of time during which this custom had continued.

3. The learned trial Judge erred in refusing to allow plaintiff to prove at the trial that no order or rule nad ever been issued by the defendant railroad company against this custom.

4. The learned trial Judge erred in refusing to allow the jury to pass upon the facts in the case at the trial.

5. The District Court of the United States erred in refusing to take off the judgment of nonsuit entered by the trial Judge at the time of trial.

GEORGE DEMMING,
Attorney for Plaintiff in Error.

PRAECIPE SUR TRANSCRIPT.
(Filed April 27, 1915.)

To the Clerk of the District Court of the United States,

SIR:

In making up the record sur writ of error in the above case you will include the following papers:

Docket Entries.
Writ of Error.
Statement of Claim.
Plea.
Bill of Exceptions.
Order Refusing to Take off Nonsuit.
Exception.
Judgment.
Assignments of Error.
Clerk's Certificate.

And no others.

GEORGE DEMMING,
Attorney for Catherine C. Reese, Admx.
4/27/15

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *sct.:*

I, William W. Craig, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and faithful copy of so much of the pleas and proceedings in the case of Catherine C. Reese, Administratrix of the Estate of Garrett Tracy Reese, Deceased, v. Philadelphia and Reading Railway Company, No. 2660, June Session, 1913, as per praecipe filed, a copy of which is hereto attached, now remaining among the records of the said court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said District Court at Philadelphia, this twenty-eighth day of April, in the (Seal) year of our Lord one thousand nine hundred and fifteen, and in the one hundred and thirty-ninth year of the Independence of the United States.

WILLIAM W. CRAIG,
Clerk District Court United States.

In the United States Circuit Court of Appeals for the Third Circuit,
March Term, 1915.

No. 1958.

CATHERINE C. REESE, Administratrix, Plaintiff in Error,
vs.
PHILADELPHIA AND READING RAILWAY COMPANY, Defendant in Error.

And afterwards, to wit, on the twelfth day of May, 1915, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. Joseph Buffington, Hon. John B. McPherson, and Hon. Victor B. Woolley, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the second day of August, 1915, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

In the United States Circuit Court of Appeals for the Third Circuit,
March Term, 1915.

No. 1958.

CATHERINE C. REESE, Adm'x (Plaintiff Below),
vs.
PHILADELPHIA & READING RAILWAY COMPANY.

Error to the District Court of the United States for the Eastern District of Pennsylvania.

Before Buffington, McPherson, and Woolley, Circuit Judges.

MCPHERSON, *Circuit Judge:*

The plaintiff's husband was a fireman in the defendant's service, and was killed on the night of November 18, 1912, while his engine was engaged in shifting cars on Front Street in the city of Philadelphia. The suit is brought under the Federal Employers' Liability Act, and no question is raised about the applicability of that statute. The trial judge entered a nonsuit and refused afterwards to take it off, this refusal being the final judgment under the Penna. practice to which a writ of error lies. The only question before us is, whether the undisputed evidence permits the inference that the company was negligent in failing to provide the deceased with a safe place to work.

The engine on which Reese was the fireman was shifting cars from one point to another, and while engaged in this duty was

obliged to enter sidings or switch tracks. In so doing it was compelled to pass around curves and in all these movements it necessarily approached any car that might be standing on an adjacent track. The particular negligence charged is, that the defendant "negligently and improperly constructed and maintained said track upon which said deceased's engine and tender was running, and the adjoining track, * * * in too close proximity to each other." It appeared that the clearance between the tracks was about 2 feet less than the standard, but it also appeared that the sidings had been located under proper municipal authority, and had been in use for 15 years. The 2 straight tracks had been put down at some earlier period and altho' there was no specific testimony on the point they also had evidently been located by authority of the city; for it was testified that the general method of procedure is for councils to pass an ordinance providing for such use of a city street, and then for the Board of Highway Supervisors to examine and approve working plans that conform to the ordinance. Front Street is near the Delaware river, and the sidings branch off from the main tracks and lead not only to the wharfs but also to the freight sheds and warehouses along either side of the street. The photographs in evidence as well as the testimony make it plain that the street is not of unusual width, and that the position of the tracks must have been influenced, if not determined, by considering the necessities and the convenience of vehicles and other traffic on a busy commercial highway.

The deceased was familiar with the situation, having worked regularly in the yard for about 2 months, and irregularly for some time before. On the night in question he undertook to get some drinking water from the tank of the locomotive for his own use, and incidentally for the use of the engineer. While doing this, he leaned out beyond the tender and as he had chosen to draw the water while the engine was moving about 5 miles an hour, and moreover while it was moving around one of the curves where the clearance was least, his body came in contact with a car on the adjoining track, and received the injuries that caused his death. No question of contributory negligence is involved, but the nonsuit was properly entered if the evidence failed to prove the negligence of the company as charged in the foregoing quotation from the statement of claim.

In our opinion, the railroad company was not obliged in reason to anticipate his action at the place and under the circumstances in question, and therefore did not fail in its duty to provide the deceased with a reasonably safe place to work. The facts resemble so closely the situation in Railroad Co. vs. Newell (C. C. A. 3rd Cir.) 196 Fed. 866, that we need add little to the following extract from Judge Gray's opinion:

"Railroading is at best a somewhat dangerous employment, and requires and bespeaks reasonable prudence and care on the part of those employed in its conduct. Undoubtedly there are, in the general course of its business, specific places and situations in which employees are required to work, and there is a clear legal duty im-

posed upon the railroad company to keep these places safe for that purpose. The question, therefore, that arises in the case before us is, was the space between the edge of the freight platform and the body of a freight car a place within which the plaintiff was required to work, and therefore, to be kept reasonably safe for that purpose by the defendant? We think not. On the contrary, it was a place from which employees were excluded by the obvious situation. The freight platform was made for the convenience of loading goods onto cars and receiving goods from cars while standing on the siding. The platform, therefore, was a place upon which servants of the defendant were required to work, and which it was the duty of the defendant to make reasonably safe for that purpose. If such platform had been insecurely built, was not of sufficient width or dimensions to allow one to work thereon without danger, or, perchance, built so far from the siding as to allow one to slip between the platform and the cars, it might well be said that it was an unsafe place in which to work, for which the defendant would be liable. But it is not as to the platform as a place to work upon that the allegation of unsafety is made, but as to the space between the side of a freight car and the edge of a platform, in which no employee was required to work. Clearly the railroad company was not obliged, in considering the dimensions of that space, to provide for the safety of one who voluntarily placed himself therein.

"It was not only the right, but the duty of the railroad company, to provide freight stations and platforms for the convenient loading and unloading of cars. It concerns the public service with which a railroad company is charged. There is nothing to show that this platform, in its location or construction, was not built with due consideration and care, not only for the business to be accommodated, but for the safety of those required to work upon it. Not only so, expert evidence was offered (and, as we think, mistakenly rejected by the Court) to show that in the railroad business of the country there was a certain standardization as to the construction of such platforms in regard to their height and distance from the tracks, from which loading and unloading was to be conducted and to which the structure in question conformed. There is no evidence, however, to show that the plaintiff, or any other, employee, was required to run along between these cars while they were moving, much less that he should do so while passing the freight platform in question, and incur the dangers of so doing. This platform was not a concealed object, or one difficult of observation, and the plaintiff unquestionably was familiar with its existence and location during the whole period of his long service. Not only was the space between the car and the platform obviously not a place in which the plaintiff or any other employee was required to work, in the manner in which he alleges he was working, or in any other manner, but there is no evidence that at any other time such work was required to be done in that space. There was nothing, therefore, in the situation which could suggest to the railroad company in constructing the platform in question, that it was encroaching upon or in any way affecting the safety of a place in which its workmen

were expected to work. It provided a platform, the safety of which, as a place whereon its employees were required to work, it was its duty to protect. To hold that this space between the platform and the car was a place to which the obligation of the employer, to furnish a safe place in which to work, applied, would be to impose upon a railroad a liability of like kind as to every place or situation which could be called dangerous to those who placed themselves within its dangers, under circumstances however casual or unforeseen. Such places cannot be made safe as against accidental or unforeseen happenings. The operative requirements of a railroad prevent their being made so in the respect demanded by the plaintiff.

"Manifestly, the numerous cases cited on behalf of the plaintiff, to show liability on the part of the railroad company, where structures of any kind are placed so near the tracks upon which trains are run as to endanger those operating said trains, have no application to the present case. The place where those operating the trains—the engineers, firemen, conductors and brakemen—are required to work is, of course, in and upon the train itself, and there can be no doubt as to the duty of their employer not to expose them unreasonably to dangers while operating the train on which they are employed."

We are unable to assent to the proposition that the railroad company was bound to foresee that one of its firemen might lean out in a position of unusual danger while the engine was rounding a curve near which a car might temporarily be standing, and was therefore bound to construct its tracks in such a manner as to guard against an event so remote and so unlikely to occur. Moreover, the location of the tracks had the approval of the city, and while this may not be decisive it negatives at least the suggestion that their position was merely due to the railroad's own convenience.

The judgment is affirmed.

Endorsed: No. 1958. Opinion of the Court by McPherson, J. Received and filed Aug. 2, 1915. Saunders Lewis, Jr., Clerk.

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1915.

No. 1958. (List No. 49.)

CATHERINE C. REESE, Administratrix, Plaintiff in Error,
vs.
PHILADELPHIA & READING RAILWAY CO., Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby affirmed with costs.

(Signed) JOS. BUFFINGTON,
Circuit Judge.

Philadelphia, August 3, 1915.

Endorsed: No. 1958. Order Affirming Judgment. Received & filed Aug. 3, 1915. Saunders Lewis, Jr., Clerk.

In the Supreme Court of the United States.

CATHERINE C. REESE, Administratrix of the Estate of Garrett Tracy Reese, Deceased, Plaintiff in Error and Plaintiff Below,

vs.

PHILADELPHIA AND READING RAILWAY COMPANY, a Corporation of the State of Pennsylvania, Defendant in Error and Defendant Below.

Petition for Writ of Error.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Catherine C. Reese, Administratrix of the Estate of Garrett Tracy Reese, Deceased, the above Plaintiff in Error, feeling herself aggrieved by the final judgment entered against her in the above entitled case on the Second day of August, 1915, by the United States Circuit Court of Appeals for the Third Circuit, which judgment affirmed a judgment of the District Court of the United States for the Eastern District of Pennsylvania, also entered against her in the same cause on April 24, 1915, and directed judgment to be entered in favor of the Philadelphia and Reading Railway Company, Defendant in Error, comes now by her attorney, George Demming, Esq., and shows that the above action was begun in the District Court of the United States for the Eastern District of Pennsylvania, that the jurisdiction of said District Court was not entirely dependent upon the opposite parties to the suit, being citizens of different States, but that the suit arose under laws of the United States, and that your Petitioner is therefore entitled to a writ of error out of the Supreme Court of the United States, in accordance with Section 241 of the Judicial Code. Petitioner, therefore, prays that a writ of error may be allowed to the Supreme Court of the United States, and also that an order be made fixing the amount of security for costs which the Plaintiff in Error, your Petitioner, shall give and furnish upon said writ of error, and that, upon giving said security, all further proceedings in the United States Circuit Court of Appeals for the Third Circuit, as well as in the District Court of the United States for the Eastern District of Pennsylvania, be

suspended and stayed until the final determination of said writ of error by the Supreme Court of the United States.

And your Petitioner will ever pray, etc.

CATHERINE C. REESE,
Administratrix of the Estate of Garrett Tracy Reese, Deceased.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Catherine C. Reese, being duly sworn according to law, deposes and says that she is the Plaintiff in Error in the foregoing case and Petitioner; that the statements contained in the above petition are true, and that the writ of error therein prayed for is not taken out for the purpose of delay, but because she feels that an injustice has been done by reason of said judgment against her.

CATHERINE C. REESE.

Sworn and subscribed to before me this, the Seventh day of August, 1915.

[SEAL.] EVAN B. LEWIS,
Notary Public.

Com. expires Jan'y 22, 1917.

And now, this, the fourteenth day of August, 1915, upon consideration of the foregoing petition and affidavit, and upon motion of George Demming, Esq., Attorney for the Plaintiff in Error, and upon filing this petition for a writ of error, and assignment of errors, it is ordered that writ of error be, and it hereby is, allowed, to have review in the Supreme Court of the United States of the judgment entered herein and all the record, proceedings, etc., of the case and in any wise thereto pertaining, and that a citation be issued, addressed as prayed for, returnable within thirty days hereafter, upon the continuance of the security heretofore entered in the sum of Two hundred and fifty Dollars in the District Court of the United States for the Eastern District of Pennsylvania, that a supersedeas be granted and proceedings stayed upon this writ of error.

By the Court.
(Signed) JOS. BUFFINGTON,
Judge Circuit Court of Appeals for the Third Circuit.

Endorsed: No. 1958. Petition for Writ of Error. Received and filed Aug. 16, 1915. Saunders Lewis, Jr., Clerk.

In the Supreme Court of the United States.

CATHERINE C. REESE, Administratrix of the Estate of Garrett Tracy Reese, Deceased, Plaintiff in Error and Plaintiff Below,

vs.

PHILADELPHIA AND READING RAILWAY COMPANY, a Corporation of the State of Pennsylvania, Defendant in Error and Defendant Below.

Assignment of Errors.

And now comes Catherine C. Reese, Administratrix of the Estate of Garrett Tracy Reese, Deceased, Plaintiff in Error, and makes and files this, her Assignment of Errors:

1. The Circuit Court of Appeals for the Third Circuit erred in entering judgment affirming the judgment of the District Court of the United States for the Eastern District of Pennsylvania, entered by it on April 24, 1915, in favor of Defendant in Error and against said Plaintiff in Error.

2. The said Circuit Court of Appeals for the Third Circuit erred in not reversing the said judgment of the said District Court, and in not remanding said cause back to said District Court for a new trial.

3. The said Circuit Court of Appeals erred in not sustaining the first assignment of error filed by the Plaintiff in Error upon the record in said cause, said assignment of error being as follows:

"The learned trial Judge erred in refusing to allow plaintiff to prove at the trial the customary and usual methods employed by firemen and engineers on locomotives belonging to defendant in obtaining drinking water from the faucets, taps or nipples on the sides of tenders attached to such locomotives."

4. The said Circuit Court of Appeals erred in not sustaining the second assignment of error filed by Plaintiff in Error upon the record in said cause, said assignment of error being as follows:

"The learned trial Judge erred in refusing to allow plaintiff to prove at the trial the length of time during which this custom had continued."

5. The said Circuit Court of Appeals erred in not sustaining the third assignment of error filed by Plaintiff in Error upon the record in said cause, said assignment of error being as follows:

"The learned trial Judge erred in refusing to allow plaintiff to prove at the trial that no order or rule had ever been issued by the defendant railroad company against this custom."

6. The said Circuit Court of Appeals erred in not sustaining the fourth assignment of error filed by Plaintiff in Error upon the record in said cause, said assignment of error being as follows:

"The learned trial Judge erred in refusing to allow the jury to pass upon the facts in the case at the trial."

7. The said Circuit Court of Appeals erred in not sustaining the fifth assignment of error filed by Plaintiff in Error upon the record in said cause, said assignment of error being as follows:

"The District Court of the United States erred in refusing to take

off the judgment of non-suit entered by the trial Judge at the time of trial."

8. The said Circuit Court of Appeals erred in rendering judgment against the Plaintiff in Error and in favor of said Defendant in Error for costs of suit in said Circuit Court of Appeals.

GEORGE DEMMING,
Attorney for Plaintiff in Error.

Endorsed: No. 1958. Assignment of Errors. Received and filed Aug. 16, 1915. Saunders Lewis, Jr., Clerk.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, ss:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original transcript of record and proceedings in this Court, in the case of Catherine C. Reese, Administratrix, Plaintiff in Error, vs. Philadelphia & Reading Railway Co., Defendant in Error, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this twenty-third day of August in the year of our Lord one thousand nine hundred and fifteen and of the Independence of the United States the one hundred and fortieth.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals, before you, or some of you, between Catherine C. Reese, Administratrix of the Estate of Garrett Tracy Reese, Deceased, and Philadelphia and Reading Railway Company, a Corporation of the State of Pennsylvania, a manifest error hath happened, to the great damage of the said Catherine C. Reese, Administratrix of the Estate of Garrett Tracy Reese, Deceased, as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that

you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 18 day of August, in the year of our Lord one thousand nine hundred and fifteen.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk United States Circuit Court of Appeals for the Third Circuit.

Allowed by
JOS. BUFFINGTON,
Circuit Judge.

UNITED STATES OF AMERICA, *ss:*

To the Philadelphia and Reading Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the United States Circuit Court of Appeals for the Third Circuit, wherein Catherine C. Reese, Administratrix of the Estate of Garrett Tacy Reese, Deceased, is Plaintiff in Error, and you are defendant in Error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 18th day of August, in the year of our Lord one thousand nine hundred and fifteen.

[Seal United States Circuit Court of Appeals, Third Circuit.]

JOS. BUFFINGTON,
Circuit Judge.

Service of within Citation accepted.
WM. CLARKE MASON,
Counsel for Philadelphia & Reading Railway Co.

Aug. 23, 1915.

[Endorsed:] 1958. Citation (with acceptance of service).

Endorsed on cover: File No. 24,891. U. S. Circuit Court Appeals, 3d Circuit. Term No. 608. Catherine C. Reese, administratrix of the estate of Garrett Tracy Reese, deceased, plaintiff in error, vs. Philadelphia & Reading Railway Company. Filed August 24th, 1915. File No. 24,891.

21

No. 608. October Term, 1915.

IN THE

Supreme Court of the United States.

CATHERINE C. REESE, Administratrix of the Estate of GARRETT TRACY REESE, Deceased,
Plaintiff in Error and Plaintiff Below,

v.

PHILADELPHIA AND READING RAILWAY COMPANY,
A Corporation of the State of Pennsylvania,
Defendant in Error and Defendant Below.

Writ of Error to the United States Circuit Court of Appeals for the Third Circuit.

MOTION TO ADVANCE.

GEORGE DEMMING,
Attorney for Plaintiff in Error.

Intelligencer Ptg. Co., Philadelphia.

IN THE

Supreme Court of the United States.

October Term, 1915. No. 508.

CATHERINE C. REESE, ADMINISTRATRIX OF THE ESTATE OF GARRETT TRACY REESE, DECEASED,
Plaintiff in Error and Plaintiff Below,

v.

PHILADELPHIA AND READING RAILWAY COMPANY, A CORPORATION OF THE STATE OF PENNSYLVANIA,
Defendant in Error and Defendant Below.

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The plaintiff in error, Catherine C. Reese, hereby respectfully represents:

1. That on July 16, 1913, plaintiff in error as administratrix began a suit at law in the District Court of the United States for the Eastern District of Pennsylvania, against the Philadelphia and Reading Railway Company, the defendant in error, to recover damages for the death of Garrett Tracy Reese.

2. Said suit was of June Session, 1913, No. 2660, and was brought under the Act of Congress of April

22, 1908, known as the Railroad Employers' Liability Act, and its Amendment of April 5, 1910.

3. Plaintiff in error was duly appointed administratrix of the estate of said Garrett Tracy Reese, deceased, by the properly constituted authorities of the State of Pennsylvania before she brought said suit, viz., on March 8, 1913.

4. The facts upon which said suit was based, as shown by the statement of claim and as developed at the trial, briefly are as follows:

Plaintiff's intestate, Garrett Tracy Reese, had been employed by defendant in error as a locomotive fireman for about three years altogether and for about two months at the place of his accident. On the night of November 18, 1912, a few minutes before midnight, as deceased was leaning out from the opening between the engine and the tender for the purpose of securing a drink of water from the tap or nipple on the side of the tender provided by the railway company for that purpose, he was struck by a box car standing on the adjoining track, knocked from his position, rolled and squeezed, receiving injuries from which he shortly afterwards died. The track on which the box car that struck deceased was standing was at least two feet two inches too close to the track on which the locomotive upon which deceased was employed was running, according to the standard in usage of the defendant company itself.

5. Plaintiff in error offered to show at the trial that deceased at the time he met with his accident was merely doing that which was customary with other employees of defendant in error.

6. Deceased was thirty-seven years of age at the time of his death and was the sole support of his widow and five minor children.

7. At the first trial of the case on April 24, 1914, by a "special verdict" the jury evidently meant to award damages to the plaintiff, but it was construed to be a verdict in favor of defendant and a new trial was ordered.

8. At the second trial of the case on February 8, 1915, the trial Judge entered a nonsuit on the ground that "the injury did not occur within the scope of the fireman's employment."

9. Upon appeal, the nonsuit was sustained by the United States Circuit Court of Appeals for the Third Circuit on the ground that the defendant railroad company had no reason to expect the deceased to get a drink of water and use the appliance provided for this purpose at this particular point.

10. Plaintiff in error thereupon took out this writ of error from the judgment of said Circuit Court of Appeals to the Supreme Court of the United States.

11. Plaintiff in error begs permission to call the attention of this Court to the fact that the question upon which her case turned in the lower court, i. e., whether or not an employee taking a drink of water in the course of his regular duties is not acting in the scope of his employment, is not only of importance to herself, but is of general and nation-wide interest, and should be finally determined as quickly as possible, as this same question may arise at any time in other lower courts.

12. Plaintiff in error likewise begs to submit to the attention of this Court that the question upon which the Court of Appeals affirmed the nonsuit, viz., that an employee of a railroad company cannot be expected at all times and places to respond to a call of nature is also of general and extraordinary interest.

13. Aside from the general importance of the determination of these matters, your petitioner strongly feels that there must surely be some legal redress for the widow and minor children for the loss of their deceased husband and father under the circumstances as narrated above, where he was merely taking a drink of water in the customary way and from the proper appliance, and where there is a violation of its own standard by his employer.

14. Your petitioner represents a widow by reason of this accident, with five small children to support, who were left destitute and entirely dependent upon her own efforts for their maintenance. For over two years now she has struggled to do this and carry on this unsuccessful litigation in an effort to secure what she believes to be her rights.

If, in the wisdom of this Court, it is consistent with the other prior and probably more important business before it, and not trespassing too much upon the rights and time of other litigants, she prays this Court to fix an early time for the argument and disposal of her writ of error. As she is advised by her counsel that the hearing of her case would consume but a comparatively brief space of time, she suggests to the Court, if proper, that her case be placed on the next summary docket.

For all of which relief your petitioner respectfully prays.

CATHERINE C. REESE,
Administratrix of the Estate of
Garrett Tracy Reese, Deceased.

By her attorney,
GEORGE DEMMING.

No. 603.

Supreme Court of the United States

INDEX.

ALPHABETICAL LIST OF ALL CASES REFERRED TO, TOGETHER WITH REFERENCES TO PAGES WHERE CITED.

INDEX—Continued.

IN THE

Supreme Court of the United States,

October Term, 1915. No. 608.

CATHERINE C. REESE, ADMINISTRATRIX OF THE ESTATE OF GARRETT TRACY REESE, DECEASED,
Plaintiff in Error and Plaintiff Below,

vs.

PHILADELPHIA AND READING RAILWAY COMPANY, A CORPORATION OF THE STATE OF PENNSYLVANIA,
Defendant in Error and Defendant Below.

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

AN ACTION IN TRESPASS UNDER THE RAILROAD EMPLOYERS' LIABILITY ACT OF CONGRESS OF 1908 AND ITS AMENDMENT OF 1910, BY THE WIDOW, APPOINTED ADMINISTRATRIX, FOR THE ALLEGED WRONGFUL KILLING OF HER HUSBAND, WHILE EMPLOYED BY THE DEFENDANT, WHILE USING APPLIANCES FURNISHED BY THE DEFENDANT, AND DUE TO THE NEGLIGENT AND IMPROPER CONSTRUCTION AND MAINTENANCE OF ITS TRACKS.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE QUESTION INVOLVED.

The question involved in the present writ of error is whether a fireman of a locomotive is engaged within the scope of his duties and doing something which should be anticipated by his employer in taking a drink of water during the performance of his work, and whether his alleged carelessness in so doing and using an appliance furnished for this purpose by his employer is a question of fact for the jury.

STATEMENT OF THE CASE.

This is an action brought by Catharine C. Reese, administratrix of the estate of Garrett Tracy Reese, deceased, for damages against the Philadelphia and Reading Railway Company, under the Federal Employers' Liability Act of 1908 and its Supplement of 1910. The action is brought on behalf of Catherine C. Reese, the widow of said Garrett Tracy Reese, and five minor and dependent children, being of the respective ages of ten years, eight years, six years, three years and seven months, at the time of the death of their father.

The dead man was employed by the Philadelphia and Reading Railway Company in the capacity of a locomotive fireman. He was employed at night time on and about an engine which was used indiscriminately in the railroad company's yards and tracks in and about the City of Philadelphia for the purpose of shifting and placing cars, the making up of trains and the pulling of these trains when made up for a certain distance in their journey from Philadelphia to other points. At the time of the accident the locomotive on

which the deceased was employed was working in and about what was known as the Noble or Willow Street yard of the Philadelphia and Reading Railway Company. The deceased had worked at this place for about two months previous to his death. The Noble or Willow Street yard of the railroad company consisted of a number of tracks branching fan-shaped into sheds, freight houses, warehouses and wharves on the Delaware River, where vessels were loaded and unloaded from and to cars on these tracks. Two main tracks, located on Front Street, Philadelphia, led to and connected this yard with the rest of the railroad system. The accident happened at a point just where the two main tracks connect with the yard. The two main tracks on Front Street run practically north and south. The evidence was conclusive and undisputed that, according to the standard of the Reading Railway itself, these two main tracks at this place were from two feet two inches to two feet five inches too close together. In other words, according to the evidence, at the point of the accident, the clearance of cars, engines and tenders, passing each other, was only four or five inches, whereas, it should have been two feet six inches to two feet nine inches. The evidence was that the Reading Railway Company had filed its own plans and designs with the Highway Department of the City of Philadelphia for these very tracks, road-bed and curves at this place in 1896 and 1897, and had constructed them thereby without interference or interposition by the City of Philadelphia or any other outside agency.

The deceased fireman was thirty-seven years of age at the time of his death, was a robust, healthy man, of good habits, an exemplary husband and father, a capable provider for his family, and an efficient, energetic workman, about whom no complaint had ever been made.

On the night of November 18, 1912, a few minutes

prior to midnight, the engine upon which deceased was working, in the course of performing its duties, came on the main track on the western side of Front Street, pulling two box cars. One box car was left standing upon the "straight iron",—that is to say, on the straight part of the main track just above the point where the track starts to curve into side-tracks and switches. The engine then proceeded a short distance, pulling the other box car attached to the tender up the western main track to the first cross-over, where it crossed over to the eastern main track. It then proceeded to push this box car back down the eastern main track, past the place where the eastern main track curved into the yard and around the curve a very little distance upon a track in the yard known as Track No. 9. Here the engine left the second box car; and then started forward again around this curved track back onto the straight eastern main track again.

The testimony showed that when the first box car was left standing on the straight iron, the deceased fireman was busily engaged in bringing up his fires and steam pressure in order to prepare the engine for its next duty, which was to pull a heavy train up the main track to Berks Street. It was shown also that the duties of the dead fireman in no way concerned the uncoupling or the placing of cars. There was no evidence whatsoever to show or allow the inference that the dead fireman knew where this box car had been placed on the straight track, or, in fact, that any box car had been placed there at all. After the engine had proceeded down to the cross-over and was pushing the second box car back on the eastern straight track, the engineer testified that the fireman at this point came over to his, the engineer's, running board side of the engine (which was the right side, of course, and opposite side to where the box car was standing), and asked the engineer for the water bottle that he might get a drink of water.

The engineer indicated the bottle to him and remarked that the water was warm. Thereupon, the fireman said he would get some fresh water. The engineer testified that when the fireman got this water bottle, after getting a drink for himself, it was the custom for him to fill the bottle with water and bring it back to the engineer, thus filled, for the purpose of giving the engineer drinking water. The fireman took the water bottle and went back along the running board to his proper place of duty, i. e., between the engine proper and the tender, and this was the last seen of the fireman until a short time thereafter, when, as the engine was coming back, after placing the second box car on track No. 9, and was coming around the curve onto the straight eastern main track, at the point where the box car was left standing on the straight western main track, the fireman was seen leaning out of the opening between the engine and the tender, attempting to get water in his water bottle. While in this position, with the engine moving at a speed of about five miles an hour, according to the engineer's estimate, by reason of the close proximity of the tracks, the fireman's body came in contact with the side of the standing box car on the western main track, he was thrown from his position, rolled and squeezed between the side of the tender and the side of the box car, and received injuries from which he died a few hours thereafter.

The testimony showed that the place where the engineer and fireman of this engine (and many other engines of the same type) obtained their drinking water was a small tap or nipple on the outside of the tender, a couple of inches above the floor of the tender and about two or two and one-half feet back from the front of the tender or the opening between the tender and the locomotive. The flow of the water in this nipple was manipulated by a valve on the top of the side of the tender, which was worked from the inside, but in order to

get the water flowing out of the nipple, one had to get partly down on the step leading to the tender between the locomotive and the tender, and lean out along the side of the tender. This posture, of course, would bring one's body part way at least outside of the line of the tender. The offer was made by various witnesses to show that the custom of the firemen and engineers on the engines of the Reading Railway, thus equipped with these appliances for drinking water, was to lean out and obtain this water from these spigots, taps or nipples, while the engine was in motion, and that this custom had continued for a long time. The trial judge ruled out this testimony. An offer was also made to show that the railroad company had never promulgated or put into effect any rule forbidding the use of this nipple or tap while the engine was in motion. This was likewise ruled out.

The testimony showed beyond a doubt that there was no other drinking water on or about the engine except such as was obtained from this nipple, and that neither fireman nor engineer was expected to leave the engine while engaged in work. No one saw the dead fireman when he started to fill the water bottle. Whether he began to use the nipple and to get a drink for himself when the engine had stopped on track No. 9 for the purpose of leaving the box car, and the engine had then started up again on its road back to the main track before he had completed the operation of rinsing out the bottle, getting a drink for himself and filling it again for the engineer, does not appear. As to what the fireman did after leaving the engineer on the engineer's side of the engine, when the engine was backing to place the box car on No. 9 track up to the time the fireman was seen leaning out just a moment or so previous to being struck by the box car, is left entirely to inference and speculation. Likewise, as said above, is it left entirely to inference and speculation as to

whether the dead fireman knew that a box car had been left on the western main track, and, most important of all, that it had been left at such a point, so close to the eastern main track, that he, the fireman, could not clear the car if he should lean out from the tender. The engineer testified, as before stated, that when the first box car was left on the western main track, the fireman was very busily engaged with his fire, and that when the fireman came on the engineer's side when they were pushing the box car on the eastern main track, the fireman would at that time be on the opposite side of the engine from the box car, would have his back to the box car on the western track and would have no occasion to notice it.

After leaving the second box car on No. 9 track, the next duty of the engine and its crew, and the duty it was then on its way to perform, was to couple up to a train of twenty loaded cars and pull this train up the main track as far as Berks Street, on its road to its destination. At Berks Street the train was to be handed over to another engine to complete the journey. At least two of the cars of this train bore interstate commerce and were destined to points in other States than Pennsylvania.

ASSIGNMENTS OF ERROR.

1. The Circuit Court of Appeals for the Third Circuit erred in entering judgment affirming the judgment of the District Court of the United States for the Eastern District of Pennsylvania, entered by it on April 24, 1915, in favor of the defendant in error and against plaintiff in error.

2. The said Circuit Court of Appeals for the Third Circuit erred in not reversing the said judgment of the said District Court, and in not remanding said cause back to said District Court for a new trial.

3. The said Circuit Court of Appeals erred in not sustaining the first assignment of error filed by the plaintiff in error upon the record in said cause, said assignment of error being as follows:

> "The learned trial judge erred in refusing to allow plaintiff to prove at the trial the customary and usual methods employed by firemen and engineers on locomotives belonging to defendant in obtaining drinking water from the faucets, taps or nipples on the sides of tenders attached to such locomotives."

4. The said Circuit Court of Appeals erred in not sustaining the second assignment of error filed by plaintiff in error upon the record in said cause, said assignment of error being as follows:

> "The learned trial judge erred in refusing to allow plaintiff to prove at the trial the length of time during which this custom had continued."

5. The said Circuit Court of Appeals erred in not sustaining the third assignment of error filed by plaintiff in error upon the record in said cause, said assignment of error being as follows:

> "The learned trial judge erred in refusing to allow plaintiff to prove at the trial that no order or rule had ever been issued by the defendant railroad company against this custom."

6. The said Circuit Court of Appeals erred in not sustaining the fourth assignment of error filed by plaintiff in error upon the record in said cause, said assignment of error being as follows:

> "The learned trial judge erred in refusing to allow the jury to pass upon the facts in the case at the trial."

7. The said Circuit Court of Appeals erred in not sustaining the fifth assignment of error filed by plaintiff in error upon the record in said cause, said assignment of error being as follows:

> "The District Court of the United States erred in refusing to take off the judgment of nonsuit entered by the trial judge at the time of trial."

8. The said Circuit Court of Appeals erred in rendering judgment against the plaintiff in error and in favor of said defendant in error for costs of suit in said Circuit Court of Appeals.

ARGUMENT.

Interstate Commerce.

Inasmuch as the next duty to be performed by the engine was to pull a train of loaded cars from the Noble Street yard to Berks Street, which hauling was part of the journey or trip of this train of cars, and of which train of cars two cars were destined to points outside the State, and the engine was actually on its road to perform this duty, the engine and its crew, including the dead fireman, were engaged in interstate commerce.

Pedersen v. Delaware, Lackawanna & Western Railway Co., 229 U. S. 146 (1913);

St. Louis & San Francisco R. R. Co. v. Seale, 229 U. S. 156 (1913);

Norfolk & Western Railway Co. v. Earnest, 229 U. S. 114 (1913);

North Carolina R. R. Co. v. Zachary, 232 U. S. 248 (1914);

New York Central & Hudson River R. R. Co. v. Carr, 238 U. S. 260 (1915).

Scope of Employment.

The learned trial judge entered a nonsuit in the case on the ground "that the injury did not occur within the scope of the fireman's employment."

The learned judge of the Circuit Court of Appeals in affirming this nonsuit is utterly silent as to the ground of the scope of employment and appears to affirm solely on the ground that the railroad company was not bound to foresee that the fireman would lean out to get a drink of water at this particular point and that, therefore, the employer did not provide the deceased with an unsafe place in which to work.

As this Court could, therefore, affirm the decision of the lower court on either or both of these grounds, plaintiff in error feels bound to discuss and argue both.

We will take them up in order.

To say that because a workman, in the course of his ordinary duties, takes off sufficient time to get a drink of water, is doing an act which does not arise out of and in the course of his employment, seems to be a most remarkable and untenable proposition. All the modern decisions are to the contrary. And in construing and applying these decisions to the present case, it must be recalled that this nipple or tap was the appliance provided by the employer, according to the undisputed testimony, for the purpose of affording drinking water to the crew of the engine; and the offer was made to show that the employer had knowledge, or should have had knowledge, of the custom on the part of the employees, without any rule to the contrary, to use this tap or nipple while the engine was in motion, and that they had done so for a long time previous to this accident.

> "The employee still retains his character as such employee in the case of necessary interruptions of his work, as where, for example, he leaves

his work to obey a call of nature, and is entitled to compensation for injury received provided this act is performed at a proper place."

Sect. 480, page 1059, Boyd on Workmen's Compensation.

"A workman's employment is not confined to the actual work upon which he is engaged, but extends to those actions which by the terms of his employment he is entitled to take as where by the terms of his employment he is taking his meals on the employer's premises.

"In other words, a workman does not lose his character as a workman while eating his lunch on his employer's premises at a place where he may safely do so and not at an expressly forbidden place or a place of obvious danger."

Sect. 481, page 1060, Boyd on Workmen's Compensation.

A brewer's drayman, employed all day in driving about the streets delivering goods and taking orders, without any definite interval or opportunity for meals or refreshments, stopped his dray about 2 P. M. opposite a public house. He had a glass of beer and left the public house in less than two minutes. He was knocked down and killed by a motor car as he was crossing the road to rejoin the dray. Held, the accident arose out of and in the course of his employment.

Martin v. Lovibond & Sons, Ltd., 2 K. B. 227 (1914);

Butterworth's Workmen's Compensation Cases, Vol. 7, page 243.

A ship's fireman in the tropics, unused to the work, and working longer hours than usual owing to the ship being short-handed, disappeared. It was the custom of firemen to come up on deck for fresh air, and this

man had been seen to come up on deck for water shortly before he was last seen in the stoke-hole. Held, that the inference was the accident arose out of his employment.

Lee v. Stag Line, Ltd.;
Butterworth's Cases, Vol. 5, page 660.

A workman was employed to watch trawlers as they lay in a harbor. He had to provide his own food and it was occasionally necessary for him to be on the quay to which the trawlers were moored. In the course of his watch he left the trawlers and went to a hotel near at hand for some refreshment. He was absent a very short time, had returned to the quay, and while descending a fixed ladder attached to the quay to go on board one of the trawlers he fell into the water and was drowned. Held, that the accident to deceased arose out of and in the course of his employment.

Jackson v. General Steam Fishing Co., Ltd.,
(1909) A. C., 523, 78 L. J. P. C. 148;
Butterworth's Cases, Vol. 2, page 56.

A similar case to the above and decided the same way is that of

Moore v. Manhattan Liners Ltd. (1910), L. J. A. C. 498.

A miner, who had received his lamp at the lamp cabin, left the cabin and went apparently in the direction of his work. Five minutes later his body was found on the siding, and it was clear that he had been run over by the cars on the siding. The court found that the man had gone to the place in question for the purpose of relieving himself, that although the closets provided were some distance away, yet the strong presumption was that the deceased had to resort to the

place where found, and that consequently the accident arose out of and in the course of his employment.

Lawless v. Wigan Coal & Iron Co., Ltd. (1908), 124 L. T. Jour., 532;
Butterworth's Cases, Vol. 1, page 153.

In the case of

M'Lauchlan v. Anderson (1911), 48 Scotch L. R. 349,

a workman, laborer, sitting on a wagon pulled by a traction engine from one quarry to another, dropped his pipe. In attempting to get down to recover it, he lost his balance, fell in front of the wheels of the wagon, was run over and seriously hurt. Held, accident "arose out of and in the course of his employment."

The case of

Keenan v. Flemington Coal Co., Ltd. (1902), 40 Scottish L. R. 144,

is directly in point.

A miner left the pit-head where he was working and went to the boilers to get a drink of water. When returning he was struck by a hutch and killed. Held, reversing lower court, he was killed "in the course of his employment."

Opinion of Lord Justice Clerk, The Right Honorable J. H. A. MacDonald (Court of Sessions):

> "I am quite clear that the Sheriff-Substitute has pronounced a wrong opinion in this case. This man, when he went for a drink of water, was still on his master's premises, and still, in the ordinary sense, in his master's employment. Is it to be said for a minute that a man ceases to be in the course of his employment every time that he for some necessary reason, leaves his work? It would be contrary to all decency for an employer not to pro-

vide water for his men, or not to permit them to go for a drink of water when they desire to have one. Going for a drink of water is a necessary reason for stopping work for the moment, because when a man feels thirsty it hinders him from working with vigor, and it is very proper that he should be allowed to go for a drink of water on the premises. There may be cases imagined where this might be used as a pretence in order to waste time, but no such case is averred here. It is a simple case of a man feeling thirsty at his work and going for a drink of water to a place close at hand on his master's premises. In such a case the workman is clearly still in his master's employment."

In the following cases workmen were injured during dinner hour going to and returning from a place to relieve nature, and held that the accidents arose out of and in the course of the employment:

Blovelt v. Sawyer, 6 Workmen's Compensation Cases, 16;

Elliott v. Rex, 6 Workmen's Compensation Cases, 27.

A servant employed on a railroad in repairing the track does not cease to be a servant, nor is he out of the line of his employment, when, for a few minutes, he actually quits work in order to obtain a drink of water.

Jarvis v. Hitch (Ind.), 65 N. E. Rep. 608 (1902).

While the mere act of getting water is not a part of the duties of the employee, yet it is a physical necessity which must be attended to while the employee is engaged in his duties, and he is entitled to the same protection in the interval when he leaves his work to get water as when he is actually at work, and whether the water is provided by the employer or by himself, the employee has a right to pass over the ways pro-

vided by the employer in going to and from the place where his thirst is slaked.

Birmingham Rolling Mill Co. v. Rockhold, 42 So. Rep. 96, 143 Ala. 115 (1904).

Where toilet conveniences for employees were provided by the master in the boiler room, it was held that an employee going there to use them was still in the employ of the master.

Neice v. Farmers Co-Operative Creamery & Supply Co. (Neb.), 133 N. W. Rep. 878 (1911);

Houston & T. C. R. Co. v. Turner, 91 S. W. Rep. 562, 99 Tex. 547 (1906);

Vide also Bradbury's Workmen's Compensation Cases, Vol. 1, pages 419 to 452, inclusive; also foot-notes to Negligence and Compensation Cases, Vol. 4, pages 122 and 123.

Where an employer provides a place for his employees to eat, or directs or permits them to go to a place for that purpose, he owes to them the same duty of protection from danger there that he does at the place where such employees work.

Heldmaier v. Cobbs, 96 Ill. App. 315, 195 Ill. 172 (1901);

Thomas v. Wisconsin Central Rwy. Co., 122 N. W. Rep. 456, 108 Minn. 485 (1909).

A corporation permitting its servants to use a building on the premises as a place in which to eat their dinner, owes to them the duty not to injure them by its negligence WHILE THEY ARE USING THE BUILDING IN THE USUAL MANNER, and it is liable for such injuries,

although the building is used for other purposes and the servant would not have been injured had he remained at his usual place of work.

Carnegie Steel Co. v. Rowan, 30 Ohio Cir. Ct. 202 (1907).

A brakeman on a switch engine was sitting on the footboard at noon eating his luncheon. Another engine backed upon the track and hit the engine on which the brakeman was sitting, causing him to fall on the track, where he was killed. Held, that the relation of master and servant still continued and that defendant was liable.

Adams v. Southern Rwy. Co., 51 So. Rep. 987 (Ala.) (1910).

But even if the trial judge was of the opinion that, because the dead fireman was engaged in getting a drink of water at the time he met with his accident, he was not, therefore, acting within the scope of his employment, still, under the decisions, this was a question of fact for the jury, to ascertain whether or not he was acting within the scope of his employment.

In 26 Cyc., page 1576, Sec. 7, page 1533, Sec. 4, and page 1510, the general rule is stated to be:

> "Where the facts are in dispute, or more than one inference can be drawn therefrom, the question whether or not the servant was acting for the defendant, and within the scope of his employment, is for the jury; and this, in most cases, is to be determined by the jury from the surrounding facts and circumstances. The terms 'course of employment' and 'scope of the authority' are not susceptible of accurate definition. What acts are within the scope of the employment can be determined by no fixed rule, the authority from the master generally being gatherable from the surrounding circumstances."

This definition of the rule seems to be supported by text books generally as an inspection of Shearman and Redfield on the Law of Negligence, Thompson on the Law of Negligence, etc., will show.

The Pennsylvania courts have stated the rule as follows:

> "The scope of the servant's employment is necessarily dependent on circumstances, and a hard and fast rule cannot be laid down as to the scope of any particular employment. It is ordinarily a question for the jury whether or not a particular act comes within the scope of a servant's employment."
>
> Moore v. Matthews, 227 Pa. 488 (1910);
> Marcus v. Gimbel Bros., 231 Pa. 201 (1911).

WAS THERE NEGLIGENCE ON THE PART OF THE DEFENDANT COMPANY?

The judge who wrote the deciding opinion in the Circuit Court of Appeals states that the only question before that court was "whether the undisputed evidence permits the inference that the company was negligent in failing to provide the deceased with a safe place to work." He then goes on to affirm the judgment of nonsuit in the District Court by holding there was no such evidence.

In arriving at this conclusion, however, it is respectfully submitted he commits two vital errors:

1. He errs in the facts of the case.
2. He errs in the proper construction and application of the law.

As to the Facts.

The opinion of the Circuit Court of Appeals persists in speaking of this accident happening on "sidings" and while the "engine was rounding a curve."

THE FACT IS THAT THE ACCIDENA HAPPENED ON MAIN TRACKS, AT A POINT WHERE THEY WERE STRAIGHT, JUST BEYOND THE POINT OF CURVATURE OF ONE OF THEM (pp. 19, 27, 39, 51, 84, 86, 88 of the Record).

The opinion of the Circuit Court of Appeals says that the tracks were "located by authority of the City," leaving the strong inference that the city obliged the defendant railroad company to place them close together.

ASIDE FROM THE FACT THAT THIS WAS A MATTER OF DEFENCE, AND NO EVIDENCE AT ALL WAS PRODUCED BY THE DEFENDANT, THE TESTIMONY THERE IS ON THIS SUBJECT SHOWS THAT THE DEFENDANT COMPANY INTRODUCED ITS OWN ORDINANCE AND CHANGED AND RE-LOCATED THESE TRACKS AT THIS PLACE ABOUT NINETEEN YEARS AGO WITHOUT ANY INTERFERENCE, DICTATION OR COMPULSION FROM ANYBODY (pp. 60 to 65 and 92 of the Record).

The opinion of the Circuit Court of Appeals states that "the photographs in evidence, as well as the testimony, made it plain that the street is not of unusual width, and that the position of the tracks must have been influenced, if not determined, by considering the necessities and the convenience of vehicles and other traffic on a busy commercial highway."

AGAIN, BARRING THE FACT THAT THIS WAS A MATTER OF DEFENCE AND THAT NO EVIDENCE ON THIS LATTER POINT WAS INTRODUCED WHATSOEVER, THE EVIDENCE AND THE PHOTOGRAPHS DO SHOW THAT AT THIS PLACE ALMOST THE ENTIRE STREET IS TAKEN UP WITH VARIOUS RAILROAD

TRACKS, SWITCHES, SHEDS AND TURNOUTS, SO THAT THE "NECESSITIES AND THE CONVENIENCE" OF THE GENERAL PUBLIC COULD NOT HAVE BEEN VERY GREATLY CONSIDERED IN LOCATING THE MAIN TRACKS.

And if one can infer the above statement in the evidence, one certainly can likewise infer that there are well known and accustomed ways by which railroad companies can introduce ordinances to their liking into city councils and get them to do their bidding with reference to the use of city streets, by showing them the necessity therefor, outside of condemnation, widening the streets, elevating and depressing the tracks, and other and kindred proceedings.

The truth is, and the whole evidence in the case on this subject reeks with it, that these tracks were originally constructed long years ago, when rolling stock was much lighter and narrower than now; and they have been allowed to remain neglected, unimproved and unattended to since that time.

The opinion of the Circuit Court of Appeals states that the fireman leaned out "in a position of unusual danger."

THE EVIDENCE SHOWS THAT THE POSITION THE FIREMAN ASSUMED IN ORDER TO OBTAIN A DRINK OF WATER WAS THE USUAL, PROPER, AND ONLY POSITION HE COULD ASSUME; AND THE OFFER WAS MADE TO SHOW THAT IT WAS THE CUSTOMARY POSITION OF ALL FIREMEN FOR THIS PURPOSE, HAD BEEN SO FOR A LONG TIME, AND NO RULE OF THE EMPLOYERS HAD EVER BEEN PROMULGATED AGAINST IT (pp. 43, 58, 59, 79 and 81 of the Record).

MOREOVER, THE OPINION OF THE CIRCUIT COURT OF APPEALS ENTIRELY IGNORES THE FACT THAT THE CLEAR, EMPHATIC, UNDISPUTED TESTIMONY WAS THAT THE CLEARANCE BETWEEN THE TRACKS AT THE PLACE OF THE ACCIDENT WAS TWO FEET FOUR INCHES LESS THAN THE STANDARD OF THE DEFENDANT RAILROAD COMPANY ITSELF.

As to the Law.

The Circuit Court of Appeals states that "the railroad company was not obliged in reason to anticipate" that the dead fireman would take a drink of water at this place.

IF THIS REASONING IS ASSENTED TO BY THIS COURT THEN THE DIRECT, LOGICAL DEDUCTION FROM IT IS THAT A RAILROAD COMPANY EMPLOYER CAN DICTATE AS TO JUST WHEN AND WHERE, AND UNDER WHAT CIRCUMSTANCES, ITS EMPLOYEES CAN AND SHOULD RESPOND TO AN ORDINARY CALL OF NATURE.

SUCH A DICTUM WOULD BE CONTRARY TO ALL THE PRINCIPLES OF REASON, COMMON SENSE, SOUND LAW AND HUMANITY. IT WOULD BE ACTUALLY BARBAROUS, AND WOULD BE IMPRACTICAL BECAUSE INCAPABLE OF MEANS OF ENFORCEMENT.

Even if this could be so, it would not apply here, because the railroad company never told this dead fireman that he would only be allowed to get a drink of water at a certain time and place. He was left to respond reasonably to his natural desires, as influenced by the degree, kind and method of his work.

Much argument can be found against such a proposition in the language used in the cases cited in this brief under the heading of "Scope of Employment," but it hardly seems necessary to refer specifically to this.

It is respectfully submitted that the one decision cited by Circuit Court of Appeals to sustain its decision,

Railroad Co. v. Newell, 196 Fed. 866 (1912),
(C. C. A. Third Cir.),

by reason of its dissimilar facts and circumstances, has no application to the present case. In the case cited there was no violation of a standard duty, as in the present; nor does there seem to be a perfect analogy between a brakeman voluntarily placing himself between a freight platform and the side of a car and a fireman leaning out from his tender to get a drink of water in the only position feasible and from the only appliance at hand.

THE WHOLE OPINION OF THE CIRCUIT COURT OF APPEALS, BOILED DOWN, RESOLVES ITSELF INTO THIS:

(1) IT IS INFERRED THE CITY AUTHORITIES COMPELLED THE RAILROAD COMPANY TO PLACE ITS TRACKS CLOSE TOGETHER AND TO VIOLATE ITS OWN STANDARD THEREBY.

(2) IT IS PRESUMED THAT THIS IS ENTIRELY SUFFICIENT TO EXCUSE THE RAILROAD COMPANY FROM ALL LIABILITY FOR NEGLIGENCE OR FAULT AND TO RENDER NUGATORY THE STRICT PROVISIONS OF THE ACT OF CONGRESS OF APRIL 22, 1908.

(3) IT IS DECIDED THAT A RAILROAD EMPLOYER DOES NOT HAVE TO ANTICIPATE AN EMPLOYEE RESPONDING TO A NORMAL CALL OF NATURE EXCEPT AT CERTAIN TIMES AND PLACES—THESE TIMES AND PLACES NOT BEING SPECIFIED,

AND THERE BEING NO COMPULSION ON THE EMPLOYER TO GIVE ITS EMPLOYEES NOTICE THEREOF.

As to the first proposition, being entirely unsupported by any testimony, it is submitted it is obvious error and requires no extended argument.

As to the second proposition:

The fact that the tracks are built, maintained and used in a public street presumes that they are there by proper authority. If so, then they should have been constructed and maintained by the railroad company in accordance with its standard of care and safety, unless the company shows it was compelled against its will to do the contrary.

Let us suppose, however, for the sake of argument, that there was such an ordinance, or that regard for the convenience of street traffic caused the railroad company to construct its tracks in this position.

IF THERE HAD BEEN SUCH AN ORDINANCE, AND THE RAILROAD HAD COMPLIED, OR ATTEMPTED TO COMPLY, WITH IT IN LAYING AND MAINTAINING THESE TRACKS, THEN SURELY, IN ORDER TO ESCAPE A CHARGE OF WANT OF CARE, THE RAILROAD COMPANY AT THIS PLACE SHOULD HAVE FURNISHED OTHER MEANS FOR PROCURING DRINKING WATER FOR EMPLOYEES ON ACTIVE DUTY OTHER THAN TAPS OR SPIGOTS ON THE OUTSIDE OF TENDERS OF MOVING ENGINES.

BUT CAN REGARD FOR STREET TRAFFIC OR EVEN A CITY ORDINANCE BE ACCEPTED AS SUFFICIENT EXCUSE FOR PLACING RAILROAD TRACKS SO CLOSE TOGETHER THAT PASSING TRAINS RUB THE SIDES OF CARS AND TEAR OFF GRAB IRONS? **(Page 65 of Record.)**

IS THE TRUE INTENT OF THE ACT OF APRIL 22, 1908, TO BE AVOIDED AND NULLIFIED BY ANY SUCH JUSTIFICATION AS THIS?

WHEN CITY ORDINANCES AND CONSIDERATION FOR THE CONVENIENCES OF TRAFFIC ON CITY STREETS CONFLICT WITH A GREAT NATIONAL LAW, SHALL THEY BE ALLOWED WITH LEGAL SANCTION TO SUPERSEDE THAT LAW?

Surely the provisions and the meaning of the Act of April 22, 1908, exact from a railroad company the observation of at least its own standard of care and safety, and failure so to do renders it guilty of negligence and makes it liable for the penalty therefor.

The provisions of the Railroad Employers' Liability Act are not to be lightly regarded but are to be strictly applied and construed.

All the regulations embodied in the Railroad Employers' Liability Act supersede the laws of the several States, including the laws, rules and regulations of municipal bodies.

Mondou v. New York, New Haven & Hartford R. R. Co., 233 U. S. 1 (1912);
American Railroad Co. v. Birch, 224 U. S. 547 (1912);
Troxell v. Del., Lack. & Western R. R. Co., 227 U. S. 434 (1913).

The primary power of regulating and controlling the railroads lies with the State, although this may be delegated to the city.

Railway Co. v. Philadelphia, 101 U. S. 528 (1879);
Sioux City Street Rwy. Co. v. Sioux City, 138 U. S. 98 (1891);

Covington v. Kentucky, 173 U. S. 231 (1899).

Although the municipality, under exceptional circumstances, can require a railroad to replace its two tracks in a crowded street with one track,

Baltimore v. Baltimore Trust & Guarantee Co., 166 U. S. 673 (1897),

yet it would seem to be clearly beyond its police power to attempt to regulate railroad tracks on a public street in such a way as to endanger the life and limb of railroad employees. This would be injustice and oppression and therefore unlawful.

New York and New England R. R. Co. v. Bristol, 151 U. S. 556 (1894).

If a local or municipal regulation, ordinance, direction or supervision did require the placing of tracks so close together as to violate the standard of safety, such local or municipal regulation, ordinance, direction or supervision would be improper, unlawful and unenforceable, because it would be imposing an arbitrary and unreasonable requirement upon interstate commerce.

Chicago, Burlington & Quincy R. R. Co. v. R. R. Commission of Wisconsin, 237 U. S. 229 (1915).

Such a regulation, if it did exist, would be an unfair one and an unreasonable exercise of the police power in that it would deny the railroad employees the equal protection of the law guaranteed by the Fourteenth Amendment of the Federal Constitution, and therefore could not be sustained and should not be obeyed.

Atchison, Topeka & Santa Fe Rwy. Co. v. Vosburg, 238 U. S. 56 (1915);

Great Northern Rwy. Co. v. State of Minnesota, 238 U. S. 340 (1915);
Southwestern Telegraph & Telephone Co. v. Danaher, 238 U. S. 482 (1915);
Chicago, Mil. & St. Paul R. R. Co. v. State of Wisconsin, 238 U. S. 491 (1915).

It might be pleaded that in order for the railroad company to properly construct and maintain its tracks on this street and thereby safeguard the lives and limbs of its employees would involve great expense.

But it has been held that "a railroad cannot escape a duty by pleading the expense of its performance."

Chicago, Burlington & Quincy R. R. Co. v. R. R. Commission of Wisconsin, supra.

As to the third proposition:

A railroad company is bound to anticipate and to provide against that which is a regular custom or habit of its employees in the line of their duties. A normal response to a call of nature, while on duty, is entirely proper and inseparably connected with that duty, so far as responsibility of the employer is concerned.

Vide Cases Cited Under Scope of Employment.

"It is not contributory negligence on the part of a servant to follow a custom habitually followed by his fellow-servants, to the knowledge of the master, unless the danger is so obvious that an ordinarily prudent person would refuse to take the risk arising from such a method of work.'

26 Cyc., page 1250 (Ed. of 1907).

In a suit by the widow for damages the railroad company is bound by an habitual custom of its employees.

Taylor, B. & H. Rwy. Co. v. Taylor, 14 S. W. Rep. 918 (Texas), (1890).

If the Reading Railway Company knew of the custom to use this appliance to obtain drinking water by leaning or stretching out from the line of the tender while the engine was in motion (and if the custom had continued for a long while, as the offer of proof was, the railroad company must have known of it), and made no rule against this custom and in no way forbade it, then it must be held to have not only known of the custom but have acquiesced therein, and it should have provided that no harm would come to its employees by reason of the maintenance of the custom. Indeed, no harm would have come from the practice of this custom if the railroad company had merely observed its own standard of construction and maintenance of its tracks and road-bed. By the very nature and position of this appliance for furnishing drinking water these men were compelled to lean out from the line of the engine and tender in order to procure water while they were engaged in active work. One can imagine, also how long these men would have retained their positions with the railroad company had they insisted upon the engine coming to a stop every time they required a drink of water.

A railroad employer is bound by custom the same as any one else.

Quite a fair inference from the testimony of the engineer is that at or about this place the dead fireman, after completing his hot work in preparation for his hard pull up the main track, usually or frequently took a drink of water in the same manner as on the night in question. Never before, however, does it appear that a car was left in this exact position on the adjoining track, so that it would strike him.

Where a railroad company for nine years without objection permitted its employees to ride on its engine and the steps thereof in the discharge of their duties, it was held to be charged with knowledge of their cus-

tom in doing so, and negligent in permitting obstructions so close to the track as to strike such employees.

Heilig v. Southern Rwy. Co., 67 S. E. Rep. 1009, 152 N. C. 469 (1910).

It is thoroughly competent and proper to prove the custom, usage and continuous practice of employees, and both the master and servant are bound thereby.

Prescott v. Ball Engine Co., 176 Pa. 456 (1896).

WHERE IT IS CUSTOMARY for the brakeman to ascend to and descend from the tops of the cars by the side ladders instead of the end ladders, a railroad company is negligent if it permits obstructions so close to the tracks as to strike them in so doing.

Georgia Pac. Rwy. v. Davis, 92 Ala. 300, 25 Amer. St. Rep. 47 (1890);
Vide also: Chicago & I. R. Co. v. Russell, 91 Ill. 298 (1878);
Allen v. Burlington C. R. & N. R. Co., 57 Iowa 623 (1882);
Sisco v. Lehigh & Hud. R. Rwy. Co., 75 Hun 582, 27 N. Y. Sup. 671 (1894);
Texas & Pac. Rwy. Co. v. Hohn, 1 Tex. Civ. App. 36, 21 S. W. Rep. 942 (1892);
Riley v. West Virginia Coast & P. Rwy. Co., 27 W. Va. 145 (1885).

A somewhat similar case to the present is that of

Central Trust Co. v. East Tennessee V. & G. Rwy. Co., 73 Fed. 661 (1895).

Where a fireman, while performing a duty assigned him by the engineer, and while leaning out from the gangway of the engine, which position he would

naturally and properly assume in order to discharge that duty, was knocked from the engine by a station limit board placed too near the tracks. Held, that the railroad company was bound to know he would assume this posture and was guilty of negligence in maintaining the board so as to strike him.

It is therefore submitted that the railroad company was bound to anticipate this action by the fireman at any and all times and places.

Assumption of Risk.

It is respectfully submitted that the nonsuit entered by the lower court cannot be sustained upon the ground of the assumption of risk on the part of the deceased fireman. In view of the evidence that the dead fireman had only about two months time previous to the accident in which to ascertain the violation by the employing railroad company of its own standard in placing the tracks in too close proximity to each other, at this point, in view of the fact that his duties called him to many places other than this, and in view of the evidence that the dead fireman had nothing whatsoever to do with the placing of this box car on the western main track in such a position that it would come in contact with him if he leaned out, and that he was engaged in such various duties at and about this time as would preclude his observing the position of this box car, it is submitted that it cannot be decided as a question of law that the dead man assumed the risk of the improper construction and maintenance of the tracks. Nor, supposing that he did know of the relative position of the tracks, can it be decided as a question of law that the danger from this close proximity of the tracks was so immediate and threatening to the dead man as to compel him to elect to either throw up

his position or continue to work at his own risk. All these matters were questions of fact to be left to the jury to pass upon and to decide.

This contention is supported by all the leading decisions. In the recent case of

Stewart v. Central R. R. Co. of N. J., 235 Pa. 311 (1912),

where a railroad brakeman was injured by reason of an unplanked trestle in a railroad yard, which condition was shown to be unusual and unsafe, the court used the following language:

> "While an employee is deemed to assume the risks ordinarily and reasonably connected with his employment, and is presumed to have notice of those which are obvious, the employer is fixed with the duty to maintain instruments, appliances and conditions which do not expose his employee to dangers not ordinarily or reasonably incident to the employment; the latter has the right to presume that his employer has performed this duty, and he does not assume risks growing out of unusually dangerous conditions not to be reasonably anticipated by him. Where the measure of duty is a standard of ordinary and reasonable care, the degree of which varies, according to the circumstances, and where the facts are disputed or where there is a reasonable doubt as to the inferences to be drawn from them, the issues must be submitted to the jury."

Again, too, supposing for the sake of argument that the deceased knew both of the close proximity of the tracks and the fact that the box car had been left in this certain position, it must still not be overlooked that no one saw the actions of this dead fireman after he got the water bottle from the engineer and left the engineer's side of the engine, up to the time he was seen leaning out from the side of the tender, just pre-

vious to coming in contact with the side of the box car. It may well be (and all inferences certainly must be drawn in favor of the dead man), that this fireman waited until the engine stopped on track No. 9 to uncouple the box car, before he began getting the water from the tap or nipple; but before he had completed the operation of emptying out the warm water, rinsing the bottle, getting a drink for himself, refilling the bottle for the use of the engineer, the engine started up, pulled down around the curve on to the straight track and he was struck in completing the operation of getting the water. Certainly, this is but a fair and proper inference, would fully explain all the circumstances, exonerate the fireman from all possible blame whatsoever, and, at all events, are not all these inferences to be left to the jury to draw, explain and decide, and not for the court to pass upon as matters of law? Is it fair for the court to draw the opposite conclusion to this, and when it does so (as it has done) upon what particular testimony does it base this conclusion? There is no such testimony.

In the case of

Dwyer v. St. Louis & San Francisco Railway Co., 52 Fed. 87 (1892),

it was held that a yard-master, in the service of the railroad company, is not required to quit such service simply because he knows of the dangerous condition of the tracks in the company's yards, PROVIDED THE CONDITION IS NOT SO DANGEROUS AS TO THREATEN HIM WITH IMMEDIATE INJURY.

In the case of

Chicago, Milwaukee & St. Paul R. R. Co. v. Donovan, 160 Fed. 826 (1908),

it was held that a railroad employee does not assume

the risk of negligent operation of cars in a freight yard UNLESS HE HAS ACTUAL KNOWLEDGE OF IT AND ACQUIESCES IN IT.

Certainly, in the present case, no one could stretch the testimony to the extent of saying that the deceased fireman had actual knowledge of the leaving of this box car in a position where it could strike him, should he lean out, and acquiesced in the leaving of the car in this position. To presume the affirmative of this would be virtually to decide that the man deliberately committed suicide.

In the case of

West v. Chicago, Burlington & Quincy Railroad Co., 179 Fed. 801 (1910),

a brakeman was killed by striking the top of a bridge which had less clearance than the standard. It was held that the case was for the jury, and that the brakeman did not assume the risk in the absence of direct testimony that he knew of the small clearance of this bridge. IT WAS ALSO HELD THAT THE MERE PUBLISHING OF RULES BY THE RAILROAD COMPANY THAT CERTAIN BRIDGES WOULD NOT CLEAR A MAN ON TOP OF THE CARS COULD NOT CHARGE THE BRAKEMAN WITH ASSUMPTION OF RISK.

It has been held that maintaining a structure so close to the track that it is likely to strike a brakeman in the performance of his duties is negligence per se, AND THAT A BRAKEMAN DOES NOT ASSUME THE RISK BECAUSE HE KNEW OF THE EXISTENCE OF THE STRUCTURE AND ITS GENERAL LOCATION.

Chesapeake & Ohio R. R. Co. v. Cowley, 166 Fed. 283 (1908).

Other decisions to the same effect are the following:

San Francisco & P. S. S. Co. v. Carbon, 161 Fed. 20 (3rd Circuit, 1905), (low appliance);

Pennsylvania R. R. Co. v. Jones, 123 Fed. 753 (3rd Circuit, 1903), (absence of bumper);

Pittsburgh S. & N. R. Co. v. Lamphere, 137 Fed. 20 (3rd Circuit, 1905), (low trestle);

Gila Valley, Globe & Northern Railway Co. v. Lyon, 203 U. S. 465, (defective buffer), (1906).

It must be remembered that the deceased fireman had worked but two months around and about this place. There is nothing to charge him with direct knowledge of the close proximity of the tracks; and all the decisions are to the effect that in the absence of this direct testimony, the inference is for the jury to find whether or not he had such knowledge. The tracks were closer together at some points than others. The dead man might have known they were close at some places, but did not know about this place. Supposing, however, for the sake of argument, that he had this knowledge, there is no testimony whatever to charge him with knowledge of the fact that this box car had been left in such a position on the western main track that his body would come in contact with it, if he pursued the regular custom of leaning out from the engine while it was in motion, in order to procure drinking water. Of course, if the fireman had deliberately placed his body outside of the line of the tender, with the engine in motion, knowing that a box car was left in such a position on the adjoining track that it might or probably would strike him, he would be guilty of

contributory negligence (or assumption of risk, as the view point might be), but to constitute negligence in the action of this dead fireman, there must be reason on his part to apprehend danger, and the evidence must show that he had sufficient knowledge to cause him, or to cause any ordinarily prudent man to apprehend danger. In this the evidence is absolutely lacking and the question was, therefore, entirely one for the jury to find whether or not he did know of such danger.

> "If a servant voluntarily and unnecessarily puts himself in a dangerous position, where there are other positions which he may take, in connection with the discharge of his duties, which are safe, or reasonably so, he cannot recover damages for an injury contributed to by his negligence in so doing. But to constitute negligence there must be reason to apprehend danger; and that, as between two apparently safe positions, a servant fails to choose the one which proves to be safe in fact, cannot be ascribed to him as negligence."
>
> 26 Cyc., pages 1249 and 1250 (Ed. of 1907).

In the case of

> Norfolk & Western R. R. Co. v. Beckett, 163 Fed. 479 (4th Circuit, 1908),

a stand pipe or spout stood very close to the track. The plaintiff, a freight conductor, was struck by it while getting on a moving train at night. THE PLAINTIFF HAD BEEN ALONG THERE MANY TIMES BEFORE, AND KNEW THERE WAS A STAND PIPE AND KNEW ITS GENERAL POSITION, BUT DID NOT KNOW IT WAS SO NEAR THE TRACK AS TO BE DANGEROUS TO A PERSON IN HIS POSITION. It was held that the defendant was guilty of negligence in so placing a stand pipe, and that the plaintiff did not assume the risk therefrom, nor was he chargeable with contributory negligence.

In the case of

Choctaw, Oklahoma & Gulf R. R. Co. v. McDade, 191 U. S. 64 (1903),

a water spout hung over the cars of passing trains in such a way as not to clear a man's head. McDade was a brakeman on a passing train, and after the train had gone, he was found dead along the track just beyond the water spout. He was last seen on top of a car. McDade had been over this part of the road before, and probably knew of the existence of the spout. In holding that this was a case for the jury to pass upon, this Court said that while an employee who continues without objection in his master's employ, with knowledge of a defective apparatus, assumes the hazard incident to the situation, UNLESS THE EVIDENCE PLAINLY SHOWS THE ASSUMPTION OF THE RISK, IT IS A QUESTION PROPERLY LEFT TO THE JURY.

This decision and principle involved has been approved by this Court in the late case of

Seaboard Air Line Rwy. v. Horton, 233 U. S. 492 (1914).

In the case of

Chicago, M. & St. P. Rwy. Co. v. Donovan (1908), 160 Fed. 826, 8th Circuit (Van Devanter, J.),

it is said:

"The rule that a servant assumes all the ordinary risks of the service in which he engages presupposes that the master will perform all the duties cast upon him for the servant's protection, and, therefore, embraces such risks as are incident to the service where those duties are performed, and not such as arise out of the master's negligence. The latter are deemed extraordinary

risks, and, under a recognized exception to the rule, are assumed by the servant, if the master's negligence is actually known to him, or is so plainly observable that he may be reasonably presumed to know of it, and he then voluntarily enters or remains in the service."

And by this the deciding Judge shows he means actual and imminent danger threatening from the conditions caused by the master's negligence.

An engine hostler, who was injured while sitting in an engine cab window, with his hips protruding, on his way to a coal chute, about two hundred yards from the round-house, where he was to help coal the engine, was held to be in the line of his duty at the time he was injured, although he had no work to perform on the engine, and it was also held his contributory negligence and assumption of risk were questions for the jury.

Harvey v. Texas & P. Rwy. Co., 166 Fed. Rep. 385 (Texas) (1909), affirmed in 228 U. S. 319 (1912).

Where plaintiff's decedent, a switch man, rode on the narrow rim of the pilot of a road engine, used for switching purposes, at night, from which position he was thrown by reason of low places or inequalities in the road-bed, resulting in his death, and of which inequalities he possibly knew by reason of his long service with the railroad company, it was held that it was properly left for the jury to decide whether the deceased assumed the risk of the defective road-bed, and also whether he was guilty of contributory negligence in riding on the rim of the pilot. This was a suit under the Railroad Employers' Liability Act of Congress of 1908.

Louisville & Nashville R. R. Co. v. Lankford, 209 Fed. 321 (1913).

In the case of

Texas & Pacific R. R. Co. v. Swearingen, 196 U. S. 51 (1904),

where a railroad employee was injured by coming in contact with a scale box which was placed in too close proximity to the track, the Supreme Court of the United States uses this language:

> "KNOWLEDGE OF THE INCREASED HAZARD RESULTING FROM THE DANGEROUS PROXIMITY OF THE SCALE BOX TO THE NORTH RAIL OF TRACK NO. 2 COULD NOT BE IMPUTED TO THE PLAINTIFF SIMPLY BECAUSE HE WAS AWARE OF THE EXISTENCE AND GENERAL LOCATION OF THE SCALE BOX. . . . IT IS FOR THE JURY TO DETERMINE FROM ALL THE EVIDENCE WHETHER HE HAD ACTUAL KNOWLEDGE OF THE DANGER."

And so it is contended in the present case, the conclusion cannot be drawn as a matter of law: (1) That the dead fireman was not acting within the scope of his employment at the time of the injury. (2) That the employer was not guilty of negligence. (3) That the dead fireman assumed the risk of the improper construction and maintenance of the tracks. These are all questions which should have been left for the jury to pass upon and to find, based upon the entire evidence in the case and the inferences to be correctly drawn therefrom.

CONTRIBUTORY NEGLIGENCE.

It would seem that the very worst view that could be taken of deceased's conduct is, that at the time of his death he was using in a careless and negligent manner an appliance furnished him by his employer. Since this was a suit brought under the Federal Employers' Liability Act of 1908, if the dead man was guilty of any contributory negligence in using this tap or nipple, and the accident resulted therefrom, under the provisions

of that Act, this was a matter for the jury to pass upon and to diminish the amount of the damages which they would otherwise have given in the proportion that the dead man's negligence bore to the total negligence entering into the happening of the accident.

Norfolk & Western R. R. Co. v. Earnest, 229 U. S. 114 (1913);
Chicago, Rock Island & Pacific Rwy. Co. v. Brown, 229 U. S. 317 (1913);
Seaboard Air Line Rwy. v. Tilghman, 237 U. S. 499 (1915).

But it is not at all clear that the dead man was guilty of any contributory negligence at the time of his death.

If he was then the burden of proving this rested on the defendant.

Central Vermont Rwy. Co. v. White, Adm., 238 U. S. 507 (1915).

Ordinarily, and unless so evident that fair-minded men could not differ in regard thereto, negligence or contributory negligence is not a question of law but of fact to be settled by the finding of the jury.

Richmond & Danville R. R. Co. v. Powers, 149 U. S. 43, 45 (1892).

Approved and commented upon in

Texas & Pacific Rwy. Co. v. Harvey, 228 U. S. 319 (1912).

Says this Court in

Chicago R. I. & Pac. Rwy. Co. v. Brown, 229 U. S. 319, 321 (1913),

where a brakeman attempted to make uncoupling before cars came to stop, while slowly walking alongside:

"It is one thing to judge of a situation in cold abstraction; another thing to form a judgment on the spot. The Germanic, 196 U. S. 589, 595, 596. The movement of trains requires prompt action, and we cannot hold that as a matter of law Brown, in leaning forward to remove a pin which would have yielded to his effort, was guilty of negligence because he did not anticipate that his foot might slip and be caught in an open frog-rail of which he had or could be charged with knowledge. The case is within the ruling in Texas & Pacific Rwy. Co. v. Harvey, 228 U. S. 319."

In the case of

Kreigh v. Westinghouse, Church, Kerr & Co., 214 U. S. 249 (1909),

the Supreme Court of the United States, in affirming the doctrines enunciated in

Choctaw, Oklahoma & Gulf R. R. Co. v. McDade, supra;
Gardner v. Michigan Central R. R. Co., 150 U. S. 349 (1893); and
Deserant v. Cirillos Coal R. R. Co., 178 U. S. 409 (1900),

uses this language:

"Questions of negligence do not become questions of law except where all reasonable men must draw the same conclusion from the evidence, nor should a case be withdrawn from the jury UNLESS THE CONCLUSION FOLLOWS AS A MATTER OF LAW THAT NO RECOVERY CAN BE HAD UPON ANY VIEW WHICH CAN BE PROPERLY TAKEN OF THE FACTS WHICH THE EVIDENCE TENDS TO ESTABLISH."

Surely in the present case, with all the inferences which might be deduced from the testimony, there are several views at least which can be properly taken of the facts in the case, which would completely exonerate

the dead fireman of all blame from negligence as well as assumption of risk.

Therefore, all these facts should have been left for a jury to pass upon.

It is, therefore, respectfully submitted that the District Court was in error in entering a nonsuit in this case, that the Circuit Court of Appeals was in error in affirming that judgment of nonsuit, and that the judgments of these two courts should be reversed and the case remitted with directions to take off the nonsuit and award a new trial.

GEORGE DEMMING,
Attorney for Plaintiff in Error.

23

No. 608. October Term, 1915.

IN THE

SUPREME COURT OF THE UNITED STATES

CATHERINE C. REESE, Administratrix of the Estate of GARRETT TRACY REESE, Deceased,

Plaintiff-in-Error and Plaintiff below,

vs.

PHILADELPHIA & READING RAILWAY COMPANY, a Corporation of the State of Pennsylvania,

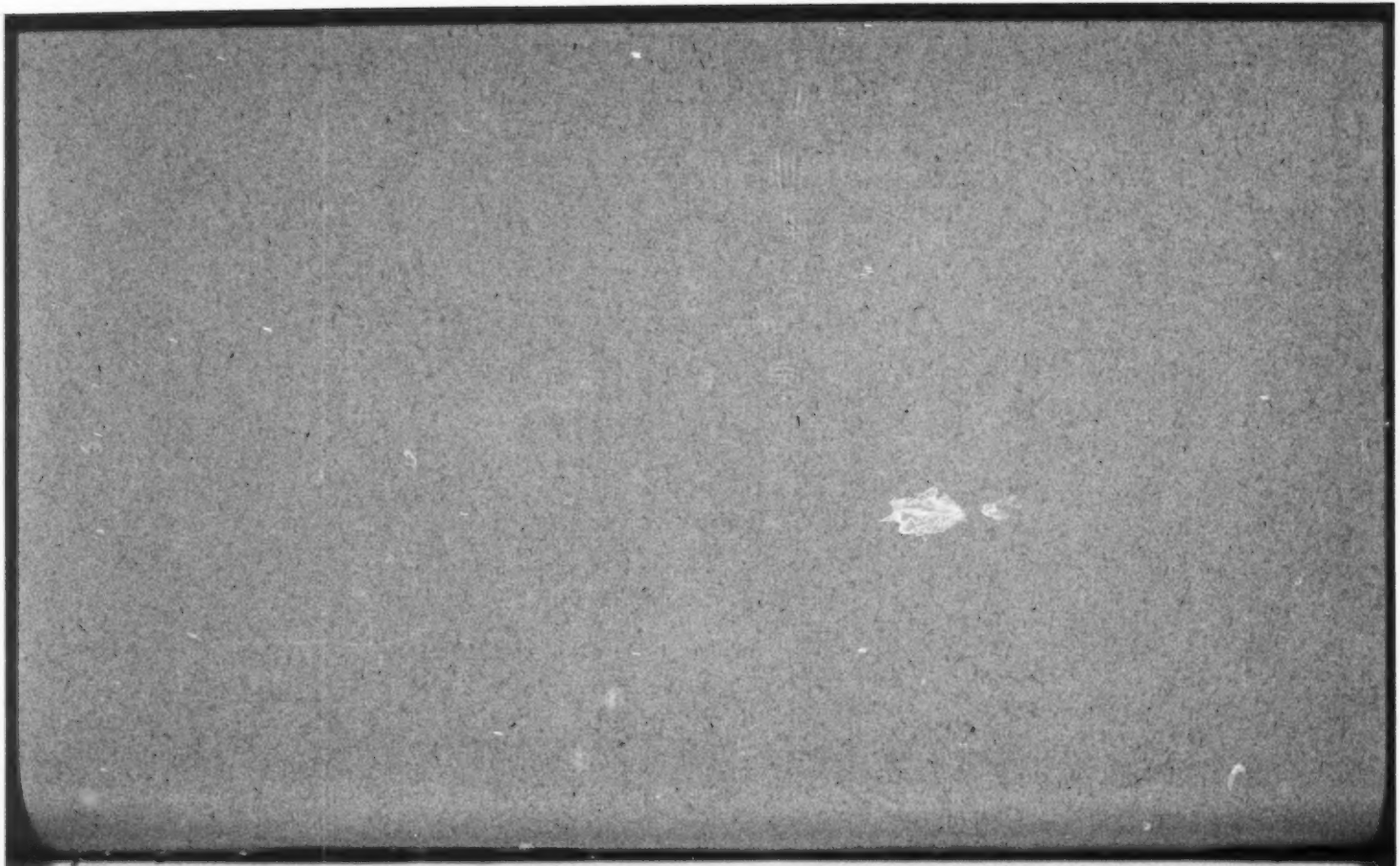
Defendant-in-Error and Defendant below.

Writ of Error to the United States Circuit Court of Appeals for the Third Circuit.

Brief for Defendant-in-Error.

Wm. Clarke Mason,
Charles Heebner,
Counsel for Defendant-in-Error.

Lawyers' Book Pub. Co., 924 Walnut St., Phila.



INDEX.

LIST OF CASES CITED.

IN THE

Supreme Court of the United States.

No. 608. October Term, 1915.

CATHERINE C. REESE, ADMINISTRATRIX OF THE ESTATE OF GARRETT TRACY REESE, Deceased,
Plaintiff-in-Error and Plaintiff Below,

v.

PHILADELPHIA & READING RAILWAY COMPANY, A CORPORATION OF THE STATE OF PENNSYLVANIA,
Defendant-in-Error and Defendant Below.

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR DEFENDANT-IN-ERROR.

COUNTER-STATEMENT OF QUESTION INVOLVED.

Where a fireman of a locomotive is killed by being crushed between a freight car standing upon the track next to that upon which his engine was running and

the tank of the engine, beyond the line of which almost his entire body was projecting, in an effort to secure a drink of water from a nipple upon the side of the tank, and the witnesses called by the plaintiff testify that he was not required to assume the position which caused the accident in the performance of any duty required of him within the scope of his employment—is the defendant railway company to be charged with negligently failing to furnish a safe place within which the fireman was required to work, because the clearance between the two tracks was not sufficient to accommodate the overhang of two cars and the body of a man between them?

ARGUMENT.

The record in this case, consisting wholly of the testimony of witnesses called by the plaintiff, shows that on the night of November 18, 1912, while the husband of the plaintiff, Reese, employed as a fireman upon a shifting engine in the yard service of the Philadelphia & Reading Railway Company, was killed by being crushed between the overhang of the tender of the engine and a box car standing upon an adjoining track. The clearance between the two tracks was not sufficient to permit the tender to pass the freight car and leave a sufficient space between the two to permit of the extension of the decedent's body.

At the time Reese was crushed he was endeavoring to secure water from a nipple upon the side of the tank by extending his body approximately thirteen inches beyond the line of the overhang of the tender while his engine was in motion going around a curve, and as it approached the standing box car he had his back toward the same, although but a few minutes previous to this movement his engine had placed the car in the po-

sition in which it was at the time of the accident, and had then passed by it pushing another car into a freight house upon the adjoining track. Similar operations had been performed upon other days by the same crew during a period of more than two months prior to the accident.

There was no evidence to show that any employee was required to work between two cars at the place where the accident occurred, and, therefore, there was no occasion to anticipate the projection of the body of any employee beyond the line of the overhang of cars on either track.

The record evidence in the form of testimony of witnesses called by the plaintiff affirmatively proves that there was no occasion for Reese to assume the position in which he was at the time he was killed, due to any act required by the duties arising in the course of his employment.

The negligence charged, and the theory upon which the case was argued in the Court below and is now presented to this Court, is that the railway company is chargeable with negligence in failing to provide Reese a safe place within which to work.

The answer to this is to be found in the testimony of the plaintiff's own witnesses, who show that Reese was not required to do any work within the scope of his employment within the place where he was killed.

The position assumed by Reese is described by **Thomas Walsh** (Record, p. 69):

> "Q. You said a little while ago that the nipple on this tank, from which the water came, was at least three feet away from the corner of the tank nearest to the engine?
>
> A. Yes.
>
> Q. In order to reach that nipple, how much of

your body would project outside of the line of the tender?

A. You would have to really get down on the side of the tank on the step. Your whole body would be out, everything would be out. You would hold on with your left hand and have, say, your left foot on the step. Your whole body would be out. You would be just standing in that position, like this way (indicating). If you had a-hold in this position on the side, your foot would be on the step and you would lean down that way (indicating). Your whole body is out.

Q. So that the entire body would necessarily project outside of the line of the tender?

A. Yes, sir."

The test of the defendant's negligence is proof that the defendant railway company failed to furnish Reese with a safe place in which to perform the duties of his employment. The motion for a non-suit was made for the reason, *inter alia*, that this proof was lacking, and in granting the non-suit the learned trial Judge said (Record, p. 101):

> "There is no evidence of negligence or neglect to provide him with a safe place to work as to the act he was performing at that time."

This finding of the learned trial Judge is amply sustained by the testimony of witnesses produced by the plaintiff:

James Neill (Record, pp. 36-37):

> "Q. You are familiar with the duties of both the engineer and fireman, are you not?
>
> A. Yes, sir.
>
> Q. In coming out of No. 9 track there was no duty that Reese was called upon to perform that would require him to extend his body outside of the line of the tender as he passed that box car?
>
> A. None whatever."

Thomas Walsh (Record, pp. 72-73):

"Q. As you were coming out from No. 9 track after you had left the car there, had you been given your signals as to what to do and where to go?

A. The brakeman on the front of the engine, of course, gave the signal to go ahead.

Q. Did he ride in front?

A. He rode on the front of the engine; yes, sir.

Q. So he was giving you whatever signals were to be received?

A. Yes, sir.

Q. And there was no occasion then for Reese to get signals from anybody?

A. No, sir.

Q. Was there any duty that Reese had to perform at that time that required him to extend his body outside of the overhang of the tank as you came out on that track?

A. Not that I know of, outside of getting the water.

Q. His duties as fireman at that time, because of your operation of the engine and the position of the brakeman on the front of your engine, were such that they did not require him to get outside of the line of your engine at all?

A. Not any more than I say.

Q. That is true, is it not? I am speaking about his duty; there was no duty?

A. No duty, no.

Q. Absolutely none?

A. No duty."

The witness **Neill**, in the course of re-direct-examination by counsel for the plaintiff, commented upon the act of Reese in assuming a position of obvious danger without being required to do so, as follows (Record, p. 37):

"Q. That is to say, do you consider getting a drink a duty?

A. There is more than one place to get a drink.

Q. Do you consider getting a drink of water out of the faucet on the tender a duty?

A. No.

Q. But the fireman and engineer did that nevertheless, did they not?

A. If they did, they did it at their own risk."

The paper book of the learned counsel for the plaintiff is filled with authorities from many jurisdictions that might be pertinent in a case containing analogous facts. The difficulty in applying most of these authorities to the case at bar lies in the difference between the fact that Reese was killed while in the employ of the defendant railway company as a fireman and the fact that although employed as a fireman, his duties as fireman did not require him to perform any service in the position which he assumed at the time of his death, and therefore there was no obligation upon the part of his employer to anticipate his presence in such a position and to guard against injury to him while there. Many of the cases cited by counsel for the plaintiff are decided upon the application of the compensation acts of the States of the United States and of foreign countries. There is no such question involved in this record.

The responsibility of the railway company in the case at bar is not to be determined by the fact that Reese was employed by it at the time of his death, but by proof of facts to establish the failure of the railway company to furnish Reese with as safe a place within which *to perform his duties as a fireman.* The plaintiff has failed to sustain the burden of proving the failure upon the part of the defendant to perform this duty, and the record therefore is barren of sufficient evidence upon which to sustain a verdict based upon negligence on the part of the railway company.

An authority directly in point is a decision of the Circuit Court of Appeals for the Third Circuit, and it was with this precedent before him that the learned trial Judge granted the non-suit.

Baltimore & O. R. Co. v. Newell, 196 Fed. Rep. 866:

> "Plaintiff, a brakeman employed in the yards of defendant railroad company, engaged in switching cars alongside of a freight platform which was on a level with the car floors and projected to within six or eight inches of the side of the cars when on the switch track, after turning the switch to run the cars onto such track, went between two cars to uncouple them, and walked along with them until opposite the platform, when, in attempting to step out, he was caught between the cars and the platform and injured."

GRAY, Circuit Judge (868-871):

> "The first two assignments of error refer to the refusal to charge requests above stated. There are several other assignments of error, as to the refusal of particular points urged by the defendant and as to certain parts of the Court's charge to the jury. With these we are not concerned, in the view we take of the facts upon which the principal and primary charge of negligence is made against the defendant.
>
> "Railroading is at best a somewhat dangerous employment, and requires and bespeaks reasonable prudence and care on the part of those employed in its conduct. Undoubtedly there are, in the general course of its business, specific places and situations in which employees are required to work, and there is a clear legal duty imposed upon the railroad company to keep these places safe for that purpose. The question, therefore, that arises in the case before us is, was the space between the edge of the freight platform and the body of a freight car a place within which the plaintiff was required to work, and therefore, to

be kept reasonably safe for that purpose by the defendant? We think not. On the contrary, it was a place from which employees were excluded by the obvious situation. The freight platform was made for the convenience of loading goods onto cars and receiving goods from cars while standing on the siding. The platform, therefore, *was* a place upon which servants of the defendant were required to work, and which it was the duty of the defendant to make reasonably safe for that purpose. If such platform had been insecurely built, was not of sufficient width or dimensions to allow one to work thereon without danger, or, perchance, built so far from the siding as to allow one to slip between the platform and the cars, it might well be said that it was an unsafe place in which to work, for which the defendant would be liable. But it is not as to the platform as a place to work upon that the allegation of unsafety is made, but as to the space between the side of a freight car and the edge of a platform, in which no employee was required to work. Clearly the railroad company was not obliged, in considering the dimensions of that space, to provide for the safety of one who voluntarily placed himself therein.

"It was not only the right, but the duty of the railroad company, to provide freight stations and platforms for the convenient loading and unloading of cars. It concerns the public service with which a railroad company is charged. There is nothing to show that this platform, in its location or construction, was not built with due consideration and care, not only for the business to be accommodated, but for the safety of those required to work upon it. Not only so, expert evidence was offered (and, as we think, mistakenly rejected by the Court) to show that in the railroad business of the country there was a certain standardization as to the construction of such platforms in regard to their height and distance from the tracks, from which loading and unloading was to be conducted

and to which the structure in question conformed. There is no evidence, however, to show that the plaintiff, or any other employee, was required to run along between these cars while they were moving, much less that he should do so while passing the freight platform in question, and incur the dangers of so doing. This platform was not a concealed object, or one difficult of observation, and the plaintiff unquestionably was familiar with its existence and location during the whole period of his long service. Not only was the space between the car and the platform obviously not a place in which the plaintiff or any other employee was required to work, in the manner in which he alleges he was working, or in any other manner, but there is no evidence that at any other time such work was required to be done in that space. There was nothing, therefore, in the situation which could suggest to the railroad company in constructing the platform in question, that it was encroaching upon or in any way affecting the safety of a place in which its workmen were expected to work. It provided a platform, the safety of which, as a place whereon its employees *were* required to work, it was its duty to protect. To hold that this space between the platform and the car was a place to which the obligation of the employer, to furnish a safe place in which to work, applied, would be to impose upon a railroad a liability of like kind as to every place or situation which could be called dangerous to those who placed themselves within its dangers, under circumstances however casual or unforseen. Such places cannot be made safe as against accidental or unforseen happenings. The operative requirements of a railroad prevent their being made so in the respect demanded by the plaintiff.

"Manifestly, the numerous cases cited on behalf of the plaintiff, to show liability on the part of a railroad company, where structures of any kind are placed so near the tracks upon which trains are run as to endanger those operating said trains, have no application to the present case.

The place where those operating the trains—the engineers, firemen, conductors and brakemen—are required to work is, of course, in and upon the train itself, and there can be no doubt as to the duty of their employer not to expose them unreasonably to dangers while operating the train on which they are employed. To refer to only a few of these cases:

"In Harvey v. Railroad Co., 166 Fed. 385, 92 C. C. A. 237, the decedent, an engine hostler, was killed in defendant's roundhouse while sitting in the cab window of an engine about to be taken to a coal chute, by his hips coming in contact with a large post supporting the roundhouse and standing within six inches of the engine cab as it passed. In another case, the company was held liable where a brakeman was struck by a switch target and thrown to the ground from a moving freight car while he was climbing the ladder to release the target, with his back to the switch, of whose dangerous proximity he had no knowledge. Also, where a switchman was killed by being knocked off of a car by the roof of a building in switching yards in the day time. Also, where a brakeman was knocked off of a car by a guy rope suspended over the track. Where a fireman, ordered by the engineer to take notice of a box on the engine, leans out and is hit by a telegraph pole, which the company negligently allowed to remain so near the track. In Choctaw R. R. Co. v. McDade, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96, plaintiff's decedent, a brakeman, was killed while in the discharge of his duties on a car in one of the company's trains, by being knocked off of the top thereof by the spout of a water tank maintained at an insufficient height above the car.

"These cases easily distinguish themselves from the one at bar, and it requires no discussion to show how inapplicable their *ratio decidendi* is to the facts with which we are here concerned. They are all cases where the place in which the plaintiff was required to work, i. e., the engine or

top of a moving train, was rendered unsafe by the negligent placing of obstructions too near the tracks. Being of opinion that the record discloses no evidence of negligence on the part of the defendant in respect to the injuries suffered by the plaintiff, we have no occasion to consider the question of contributory negligence, nor the assignments of error, other than those to which we have referred. It may be conceded that the plaintiff was injured while in the zealous performance of his duty, and that this circumstance commends him to the generous consideration of his employer, but the law, as long established and now existing, does not permit us to do otherwise than, on the grounds stated, reverse the judgment in the present case."

In the case of **Railroad Company v. Harvey**, 228 U. S. 319, and similar cases, the evidence showed that the deceased employee was in a *place* where he was required to be in the performance of a service within the scope of his employment, even though the *position* assumed by him in the *place* in question may have been due to negligence upon his part.

In the case at bar, as in the **Newell** case (supra), there was no duty required from the deceased the performance of which necessitated his presence where he was at the time of the accident, and there was no duty therefore upon the defendant to assume that in the course of his employment he would take such a position in such a place and therefore no duty to protect against the happening of the accident complained of here.

There are many questions argued in the paper book of the plaintiff-in-error, the sole purpose of which would seem to be merely to confuse the issue. The facts involved in a determination of this case and the proper disposition of them are presented so clearly in the opin-

ion filed by Judge McPherson for the Circuit Court of Appeals of the Third Circuit, that nothing further can be added to what is therein said, as follows:

> "The plaintiff's husband was a fireman in the defendant's service, and was killed on the night of November 18, 1912, while his engine was engaged in shifting cars on Front Street in the City of Philadelphia. The suit is brought under the Federal Employers' Liability Act, and no question is raised about the applicability of that statute. The trial Judge entered a non-suit and refused afterwards to take it off, this refusal being the final judgment under the Pennsylvania practice to which a writ of error lies. The only question before us is, whether the undisputed evidence permits the inference that the company was negligent in failing to provide the deceased with a safe place to work.
>
> "The engine on which Reese was the fireman was shifting cars from one point to another, and while engaged in this duty was obliged to enter sidings or switch tracks. In so doing it was compelled to pass around curves and in all these movements it necessarily approached any car that might be standing on an adjacent track. The particular negligence charged is, that the defendant 'negligently and improperly constructed and maintained said track upon which said deceased's engine and tender was running, and the adjoining track, * * * in too close proximity to each other.' It appeared that the clearance between the tracks was about 2 feet less than the standard, but it also appeared that the sidings had been located under proper municipal authority, and had been in use for 15 years. The 2 straight tracks had been put down at some earlier period and altho' there was no specific testimony on the point they also had evidently been located by authority of the city; for it was testified that the general method of procedure is for Councils to pass an ordinance providing for such use of a city street, and then for the Board of Highway Supervisors to examine and approve

working plans that conform to the ordinance. Front Street is near the Delaware River, and the sidings branch off from the main tracks and lead not only to the wharfs but also to the freight sheds and warehouses along either side of the street. The photographs in evidence as well as the testimony make it plain that the street is not of unusual width, and that the position of the tracks must have been influenced, if not determined, by considering the necessities and the convenience of vehicles and other traffic on a busy commercial highway.

"The deceased was familiar with the situation, having worked regularly in the yard for about 2 months, and irregularly for some time before. On the night in question he undertook to get some drinking water from the tank of the locomotive for his own use, and incidentally for the use of the engineer. While doing this, he leaned out beyond the tender and as he had chosen to draw the water while the engine was moving about 5 miles an hour, and moreover while it was moving around one of the curves where the clearance was least, his body came in contact with a car on the adjoining track, and received the injuries that caused his death. No question of contributory negligence is involved, but the non-suit was properly entered if the evidence failed to prove the negligence of the company as charged in the foregoing quotation from the statement of claim.

"In our opinion, the railroad company was not obliged in reason to anticipate his action at the place and under the circumstances in question, and therefore did not fail in its duty to provide the deceased with a reasonably safe place to work. The facts resemble so closely the situation in Railroad Co. vs. Newell (C. C. A. 3rd Cir.), 196 Fed. 866, that we need add little to the following extract from Judge Gray's opinion:"

(The excerpt here quoted, appearing upon pages 107-109 of the Record, is set forth in full in this Argument, pages 7-11.)

"We are unable to assent to the proposition that the railroad company was bound to foresee that one of its firemen might lean out in a position of unusual danger while the engine was rounding a curve near which a car might temporarily be standing, and was therefore bound to construct its tracks in such a manner as to guard against an event so remote and so unlikely to occur. Moreover, the location of the tracks had the approval of the city, and while this may not be decisive it negatives at least the suggestion that their position was merely due to the railroad's own convenience.

"The judgment is affirmed."

It is respectfully submitted that for the reasons heretofore given this appeal should be dismissed and the judgment of the court below should be affirmed.

WM. CLARKE MASON,
CHARLES HEEBNER,
Counsel for Defendant-in-Error.

REESE, ADMINISTRATRIX, *v.* PHILADELPHIA AND READING RAILWAY COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 608. Argued December 1, 1915.—Decided December 20, 1915.

A railroad is not to be held as guaranteeing or warranting absolute safety to its employés under all circumstances, but is bound to exercise the care which the exigency reasonably demands in furnishing proper roadbed, tracks, and other structures.

Failure to exercise such care constitutes negligence; but the mere existence of a great number of tracks close to each other in a ter-

minal where public streets are necessarily utilized is not enough to support an inference of negligence.

In this case, brought under the Employers' Liability Act, the trial court did not err in entering a non-suit for lack of evidence showing failure of the carrier to provide a safe place for the employé to work although the latter was killed by striking an obstruction while leaning out from the engine which he was on.

225 Fed. Rep. 518, affirmed.

THE facts, which involve the validity of a judgment of non-suit in a suit for death of a railroad employé under the Employers' Liability Act, are stated in the opinion.

Mr. George Demming for plaintiff in error.

Mr. William Clarke Mason, with whom *Mr. Charles Heebner* was on the brief, for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Relying upon the Federal Employers' Liability Act, plaintiff in error brought suit against the railway company in the District Court to recover damages for her husband's death, alleged to have resulted from the negligent and improper construction and maintenance of its tracks in too close proximity to each other.

At the conclusion of plaintiff's testimony, the trial court, finding "no evidence of negligence or neglect to provide him [the employé] with a safe place to work as to the act he was performing at that time," entered a non-suit and afterwards refused to take it off. This was affirmed by the Circuit Court of Appeals (225 Fed. Rep. 518) upon the ground that the railroad "did not fail in its duty to provide the deceased with a reasonably safe place to work;" and the sole question for our consideration is whether any other conclusion could be legitimately drawn from the facts disclosed.

For use in shifting freight cars and making up trains, the defendant maintains, as a part of its Noble Street Yard, two parallel tracks running north and south along Front Street, Philadelphia, from which other tracks, curves and turnouts lead into different freight sheds, warehouses, etc. These were located and are maintained under an ordinance of the city according to plans duly approved by its officials. At and near the place of the accident the street is almost entirely occupied by them. The distance between such north and south tracks is much less than the general standard adopted by the company, and box cars moving thereon have barely enough room to pass. These conditions are obvious and have existed for fifteen years or more.

Deceased was a capable, experienced fireman in a night switching crew operating in the yard, which was properly lighted, and acquainted with the general conditions described. The cause was tried upon the theory that about midnight, November 18, 1912, while his engine was moving five miles per hour along one of the parallel tracks, he attempted to procure drinking water at a tap in the side, near the bottom, and three feet from the front of the tender; that in doing so his body was extended outside the line of both tender and engine and crushed by contact with a freight car standing on the other parallel track; and that the railway negligently constructed and maintained these tracks too near each other.

The rule is well settled that a railroad company is not to be held as guaranteeing or warranting absolute safety to its employés under all circumstances, but is bound to exercise the care which the exigency reasonably demands in furnishing proper roadbed, tracks, and other structures. A failure to exercise such care constitutes negligence. *Union Pacific Ry.* v. *O'Brien*, 161 U. S. 451, 457; *Choctaw, Okla. &c. R. R.* v. *McDade*, 191 U. S. 64, 67; *Myers* v. *Pittsburgh Coal Co.*, 233 U. S. 184, 191. A railroad yard

where trains are made up necessarily has a great number of tracks and switches close to one another (*Randall* v. *Balti. & Ohio R. R.*, 109 U. S. 478, 482); and certainly the mere existence of such conditions is not enough to support an inference of negligence where, as here, it is necessary to utilize a public street. Both the District Court and the Circuit Court of Appeals felt constrained to hold the evidence insufficient to carry the question of negligence to the jury, and, having examined the record, we are unable to say that they reached a wrong result. The judgment is

Affirmed.

MR. JUSTICE HUGHES and MR. JUSTICE PITNEY are of the opinion that upon the question of the defendant's negligence,—the only question upon which the court below ruled—there was sufficient evidence to go to the jury, and therefore dissent.